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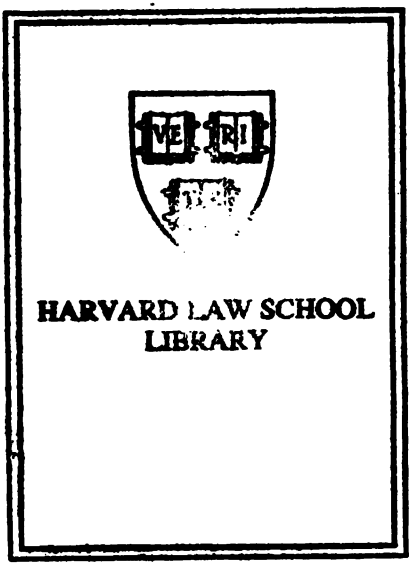

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CASES ARGUED AND DECIDED

IN THE

SUPREME COURT

OF

MISSISSIPPI

AT THE

OCTOBER TERM, 1908

AND

MARCH TERM, 1909.

VOL. 94.

REPORTED BY

T. A. McWILLIE.

CHICAGO
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1910

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* JUDGE WHITFIELD resigned April 14, 1910, and was succeeded as Chief Justice on that day by JUDGE MAYES, and on April 16, 1910, JUDGE ANDERSON was appointed to fill the vacancy on the bench caused by JUDGE WHITFIELD'S resignation. HON. ALBERT H. WHITFIELD was appointed Commissioner of the Supreme Court on the 16th day of April, 1910, for the term of nine years and HON. FRANK A. McLAIN was on the same day appointed Commissioner of the Supreme Court for the six years, under Laws 1910, ch. 164, p. 158.

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* ATTORNEY GENERAL STIRLING resigned April 5, 1910, and HON. SPENCER S. HUDSON was on the same day appointed to fill the vacancy. ASSISTANT ATTORNEY GENERAL BUTLER resigned April 5, 1910, and HON. JAMES R. McDOWELL was appointed April 18, 1910, to fill the vacancy; HON. CARL FOX was appointed additional Assistant Attorney General under Laws 1910, ch. 172, p. 164, on the 11th day of April, 1910.

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[1] HON. WILLIAM H. HARDY was succeeded by JUDGE BARRETT, January 1, 1910.

[2] HON. WILEY H. POTTER resigned April 7, 1910, and was succeeded by JUDGE HENRY.

[3] HON. JAMES R. BYRD was succeeded by JUDGE DOBBS April 6, 1910.

[4] HON. JOHN N. BUSH was succeeded by JUDGE MOUNGER January 1, 1910.

[5] HON. WILLIAM H. COOK was succeeded by JUDGE JOHNSON May 1, 1910.

[6] HON. ROBERT L. BULLARD was succeeded by JUDGE HUGHES June 1, 1910.

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CASES ARGUED AND DECIDED

IN THE

SUPREME COURT OF MISSISSIPPI,

AT THE

OCTOBER TERM, 1908.

JOHN THURMOND v. STATE OF MISSISSIPPI.

[47 South. 434.]

CRIMINAL LAW AND PROCEDURE. *Murder. Indictment. Amendment. Change of name of deceased. Designation by number. Code* 1906, § 1508.

Where on the trial of a murder case the witnesses were uncertain as to the name of the decedent as charged in the indictment, but knew him definitely as "Twelve," referring to his number as a convict, an amendment of the indictment so as to make it charge the murder of one "Twelve," a human being, etc., was permissible, under Code 1906, § 1508, authorizing the amendment of indictments.

FROM the circuit court of Holmes county.

HON. SYDNEY SMITH, Judge.

Thurmond, appellant, was indicted, tried and convicted of murder, and appealed to the supreme court. The facts are stated in the opinion of the court.

A. M. Pepper, for appellant.

The record presents a case of an indictment for the murder of one man, and a conviction under the same indictment for the murder of another man. The accused is indicted for one offense

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Brief for appellee.

and convicted for another. There was no "misdescription of the person" whom the accused is charged with having murdered. His identity and existence and whereabouts are clearly proved, establishing the facts that William Johnson still lives and had not suffered death at the hands of appellant, as alleged in the indictment.

The question then arises, can a man be tried for the murder of one person and convicted thereof on an indictment that charges the accused with the murder of another entirely different man? If this can be done, what becomes of the constitutional provisions which declare that "the accused shall have a right to demand the nature and cause of the accusation against him?" "And no person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury." "Nor deprived of life, liberty or property without due process of law."

In this case the testimony of witnesses as to the death or killing of William Brown was admitted over appellant's objection, before the indictment was amended, and afterwards. This proposition is elementary and under no rule of evidence could testimony of the killing of a different and distinct person from the one named in the indictment, be heard on the trial, on the indictment then before the court. This indictment as amended was not a "presentment or indictment of a grand jury," but an indictment found and returned by the court at the request of the district attorney.

George Butler, assistant attorney general, for appellee.

It will be noted that the witnesses for the state stated they did not know the name of deceased; that William Johnson and William Brown came there together, and that deceased was known as "Twelve." Each witness for the state in response to the interrogatory of the district attorney as to what they knew about the killing of "William Johnson" told of the death of the deceased.

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Opinion of the court.

It was proper to amend the indictment. The identity of the offense was not changed, and appellant would be in the position to plead former jeopardy, if indicted again for the offense.

The effect of the amendment was to describe accurately the identical offense for which the grand jury had indicted, and this was proper. *Miller v. State,* 53 Miss. 403.

CALHOON, J., delivered the opinion of the court.

This case is on appeal from a conviction of murder, with a life sentence. The jury, on facts in evidence, found that it was murder, and we shall not disturb that conclusion.

The man convicted was an overseer of convicts on a county farm. To this farm two men, named Will Johnson and Will Brown, had been sent as convicts. The indictment charges the murder of Will Johnson. On the trial the witnesses for the state were unable to say whether the man killed was Will Johnson or Will Brown; but they all knew and said positively that they did know the man by number only, and that he was convict No. Twelve. Thereupon the district attorney, by permission of the court, was allowed to amend the indictment by describing the man killed as convict No. Twelve. We think this amendment was proper, under Code 1906, § 1508. This interfered in no way with the full right of the defendant, should he be again indicted for the same murder, to plead previous conviction or previous acquittal. The offense charged murder, and, whatever his actual name may have been, he was convict No. Twelve.

We have carefully read the very cogent written argument of counsel for the appellant, but cannot concur with him that this record shows reversible error.

Affirmed.

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CHRIS MARCO v. CITY OF CLARKSDALE.

[47 South. 780.]

MUNICIPALITIES. *Privilege taxes. Ordinance.*

A city ordinance imposing a municipal privilege tax on five of six classes of dealers in beverages upon whom by the statute a state privilege tax is imposed, does not warrant collection of the municipal tax from the omitted class.

FROM the circuit court of, second district, Coahoma county.

HON. SAMUEL C. COOK, Judge.

Marco, the appellant, was convicted and fined by the mayor of Clarksdale, for conducting the business of a retail dealer in coca-cola, celery-cola, and like beverages, within the municipal limits of Clarksdale, a city of over three thousand inhabitants, in violation of art. 19 of the city charter. He appealed to the circuit court, where he was tried before the circuit judge, a jury being waived. The trial was on an agreed state of facts wherein it was admitted that the appellant's dealing in and selling of such beverages consisted solely of habitual sales of such drinks in bottles; that he had paid no privilege license to the city for conducting such business; and that the city of Clarksdale was a municipality having over three thousand inhabitants, incorporated under the general laws of Mississippi. As stated in the opinion, art. 19 of the city's charter is a rescript, except as presently shown, of what is now Code 1906, § 3790, and it fixes fifty per centum of the state tax in each instance as the amount of privilege tax for the city, but the last paragraph of the section, in regard to persons or firms selling any of the drinks in bottles is omitted. Code 1906, § 3790, is set forth in full in the opinion.

D. A. Scott, for appellant.

The city ordinance, under which appellant was tried, convicted and fined, is in part a duplicate of Code 1906, § 3894,

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the amount of tax being changed to conform to the statute limiting the right of municipalities in the imposition of privilege tax. The ordinance, however, fails to impose a privilege tax upon each person or firm selling any of the prescribed beverages in bottles.

Appellee's contention seems to be that the appellant is guilty of violating that part of the city ordinance imposing a privilege tax of $12.50 upon retail dealers. But it is evident that, inasmuch as the municipality did not impose any privilege tax upon persons or firms selling coca-cola in bottles within the municipality limits, it will not be permitted, under that part of the ordinance providing for the payment of $12.50 tax on each person or firm retailing coca-cola, to tax the appellant. No sales at retail were made by appellant.

It is manifest that the intention of the legislature, in enacting Code 1906, § 3790, was to impose taxation on six separate and distinct businesses; first, upon a factory or bottling establishment for the bottling of coca-cola and other like drinks; second, upon a depot for the distribution or shipment of coca-cola, etc.; third, upon the retail dealers in such described beverages in cities of over three thousand inhabitants; fourth, upon retail dealers in cities of not more than three thousand and over two thousand inhabitants; fifth, upon persons engaged in retailing such beverages in towns of less than two thousand inhabitants; and, sixth, on each person or firm selling the drinks enumerated in the code section, in bottles. If such be the correct interpretation of the statute, it is manifest that the appellant, who is engaged in the separate and distinct business of selling coca-cola only in bottles, could not legally be required to pay a privilege tax of more than $2.50, even if the sheriff demanded the same for county, state privilege, under the statute. Certainly, under any view of the matter, appellant cannot be held liable to the municipality, because the municipal ordinance does not impose privilege tax for conducting such busi-

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ness. How the court could have arrived at the sum, fixed as a fine upon appellant, to-wit, sixty two dollars and fifty cents, is not apparent, for there was no authority in the court to impose a penalty of five times any supposed privilege tax of twelve dollars and fifty cents.

Statutes imposing taxes must be construed strictly. Any doubt as to the guilt or innocence of a citizen who is prosecuted for a failure to comply with such statutes must be solved in his favor and not against him. Cooley on Taxation, 201, note; *United States v. Wigglesworth,* 2 Story, 369; *Sewell v. Jones,* 9 Pick. 412; *Vicksburg, etc., R. Co. v. State,* 62 Miss. 105.

Whenever it is doubtful whether a municipality is legally authorized to impose a privilege tax, the doubt should be solved in favor of the citizen. Laws imposing duties or taxes should not be construed beyond the natural import of the language used, and should never be construed so as to impose burdens upon citizens, where the correct interpretation of the law is doubtful. *Ex parte Taylor,* 58 Miss. 478, citing Potter's Dwarris on Statutes, 190, note; *Eskridge v. Magruder,* 45 Miss.; *Bonds v. Green,* 56 Miss. 710; *Witherspoon v. Bluett,* 47 Miss. 570; *Logan v. State,* 53 Miss. 451; *State v. Simmons,* 70 Miss. 486, 12 South. 477.

It is common knowledge that by retail dealers in the beverages mentioned in the statute are meant those persons or firms selling the beverages, not in bottles, but by the drink or glass over their counters to be drunk immediately by the purchaser. The code section was intended to mean that, if within the prescribed limits one should sell the beverage in bottles, he must pay a privilege of two dollars and fifty cents; but if he should sell otherwise than in bottles, then he must pay the tax of twenty-five dollars. Due to the fact that the municipal ordinance failed to impose any tax at all for sale of bottled coca-cola and other like beverage within the city limits, appellant is in no wise liable to the municipality.

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Brief for appellee.

J. W. Cutrer, for appellee.

In all cities of over three thousand inhabitants a retail dealer in coca-cola is required to pay a privilege tax of twenty-five dollars. It is undisputed that Clarksdale is a city of over three thousand inhabitants. A retail dealer, under the meaning of the statute, is one who is not a manufacturer or distributor, in so far as the municipal classification of dealers is concerned. A man is none the less a "retail dealer," because he sells the beverage in bottles rather than in glasses over his counter, to customers.

The true interpretation of the statute under consideration, arriving at the legislative intent from the collocation of the several parts thereof and the language used, is that no matter how a dealer may retail or handle coca-cola in municipalities, the tax upon the business must be paid, determinable in amount only by the number of inhabitants of the several municipalities in which the business may be transacted.

Because the legislature did not levy a tax on retail dealers in coca-cola, outside of municipalities, who should sell the same not in bottles, is no reason why this court should say that the legislature intended to nullify the preceding clauses of Code 1906, § 3790, expressly levying taxes upon all retail dealers in coca-cola in towns and cities of the respective populations mentioned. And, for the same reason, the fact that the legislature did levy a tax of two dollars and fifty cents "on each person or firm" selling coca-cola outside of cities and towns, in bottles only, is no reason why a person in a city or town should have the right to pay a privilege tax for selling, in bottles only, without the limits of cities and towns, and thereupon transact the forbidden business, *i. e.,* that of a "retail dealer in coca-cola," in cities and towns of certain size, without first paying the tax levied and imposed by the statute upon such dealers in all cities and towns.

A retail dealer is one who sells in small quantities or broken

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packages, as contradistinguished from a wholesale dealer or distributor. Even though the appellant sold coca-cola only in bottles, is he not a retail dealer?

It is an indubitable proposition that every statute must be construed so as to avoid apparent conflicts and repugnancies and so as to make it effective in its entirety.

WHITFIELD, C. J., delivered the opinion of the court.

The appellant was tried and convicted for selling coca-cola by retail in the city of Clarksdale, a city of more than three thousand inhabitants, and was fined five times the penalty of $12.50, making $62.50 in all. The case is here on an agreed state of facts.

Section 3894, Code 1906, is in the following words: "3894. *Privileges to be Paid to Tax Collector of County; Exceptions.* Any person other than insurance, telegraph, express and sleeping car companies, building and loan associations and commercial agencies, desiring to enjoy any of the privileges taxed by law in this state, shall first pay the tax prescribed to the collector of taxes of the county and obtain of him the license herein required for the privilege. Insurance companies, fraternal orders, incorporated insurance agencies and insurance agents shall pay direct for their privileges to the insurance commissioner. And telegraph, express, sleeping car companies, building and loan associations and commercial agencies, shall pay direct for their privileges to the auditor of public accounts, before they shall exercise any of the privileges of carrying on their business in this state. Any person or corporate body who shall exercise any of the privileges taxed by law in this state without first paying the tax and procuring the license as required, shall, on conviction, be fined not less than an amount equal to five times the tax imposed on such privileges, or shall be imprisoned in the county jail not more than six months, or both by such fine and imprisonment."

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Opinion of the court.

It was under a part of this section that the penalty was made five times the amount, $12.50, required for license, to sell coca-cola in towns of over three thousand inhabitants by retail.

Section 3790, Code 1906, is in the following words:

"3790. *Coca-cola, Colavin, etc.*—On each factory or bottling establishment for the bottling of coca-cola, celery-cola, afri-cola, hecks-cola, cola-beta and colavin, nervola, and nervo-cola, or any similar or proprietary drink, the sum of ..... $ 50 00

On each depot for the distribution or shipment of coca-cola, celery-cola, afri-cola, hecks-cola, cola-beta, and colavin, nervola, nervo-cola, or any similar or proprietary drink, the sum of 150 00

Provided this act shall not be construed to subject the bottling establishments to the tax both as manufacturer and distributor.

Same, on each retail dealer in coca-cola, celery-cola, afri-cola, hecks-cola, cola-beta, colavin, nervola, and nervo-cola, or any similar or proprietary drink, in cities of over three thousand inhabitants 25 00

Same, in cities of not more than three thousand and over two thousand inhabitants 10 00

Same, in towns of two thousand or less inhabitants 5 00

Same, on each person or firm selling any of the above drinks in bottles 2 50

Article 19 of the charter of the city of Clarksdale is a mere rescript of said section 3790, providing, however, fifty per cent of the state tax in each instance as the amount of the privilege tax for the city, and omitting the last paragraph of section 3790 altogether, which last section provided for a privilege tax of $2.50 for the state on each dealer in coca-cola selling it in bottles. This was entirely omitted from the ordinance and there is no provision in the ordinances of the city of Clarksdale imposing any privilege tax upon one selling coca-cola in

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bottles. The evidence in the case makes it perfectly plain that what appellant did was to sell coca-cola not at retail, but in bottles.

Since there was no provision in the ordinances of the city of Clarksdale providing any privilege tax for one selling coca-cola in bottles, and since that was what the appellant did, and since the appellant was not selling coca-cola by retail, it is, of course perfectly clear that the judgment must be, and it is hereby, reversed, and the prisoner discharged.

Reversed.

ELIZABETH SWANZY ET AL v. JOSEPH L. KOLB ET AL.

[46 South. 549.]

1. WILLS. *Credible witness. Code* 1871, § 2388. *Code* 1880, § 1262. *Code* 1892, § 4488. *Code* 1906, § 5078.

The word "credible" in Code 1871, § 2388, providing that if a will is not wholly written and subscribed by testator, it shall be subscribed by three "credible witnesses" in case of a devise of real estate, is synonymous with "competent."

2. SAME. *Devise to subscribing witness. Statutes. Code* 1871, § 1101. *Code* 1880, § 1973. *Code* 1892, § 1826. *Code* 1906, § 2001.

Under Code 1871, § 1101, providing that if any person shall be a subscribing witness to a will whereby any devise or bequest is made to him, and the will cannot "otherwise be proved," such devise or bequest shall be void and the witness shall be competent as to the residue of the will, as if no such devise or bequest had been made:—

(*a*) The words "otherwise be proved" refer to proof of the execution of the will and not to its contents; and

(*b*) A will signed by three witnesses (the then statutory number), to one of whom a devise is given by the will, is not void; the devise is void and the witness competent to establish the residue of the will.

FROM the chancery court of Lowndes county.

HON. JAMES F. MCCOOL, Chancellor.

Kolb and others, appellees, were complainants or petitioners

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Brief for appellants.

in the court below; Mrs. Swanzy and others, appellants, were defendants there. From a decree probating a will and adjudging the title to lands thereunder, the defendants appealed to the supreme court.

This proceeding was instituted in 1904 by Joseph L. Kolb and others, and seeks to establish the will of Joseph Kolb, deceased, who died in 1880, leaving a widow, Sarah A. Kolb, and no children, and to vest the title to the lands of the testator in complainants, the heirs at law of the testator's brothers and sisters; all of the brothers and sisters having died. The defendants to the bill are the heirs at law of testator's widow, Sarah A. Kolb. The bill charges that Joseph Kolb died leaving a will, by which he devised a life estate in his lands to his widow, Sarah A. Kolb, with remainder to his brothers and sisters; that the will was given to one Samuel Swanzy, one of the executors named therein, to be probated; but the executor failed to probate the will and it cannot now be found. The defendants answered, denying that Joseph Kolb left any will. Testimony was taken, and the chancery court upon trial of the case rendered a decree establishing the will and ordering its probation. The supreme court, at first, affirmed the decree of the court below without written opinion. Thereafter appellants filed a suggestion of error calling attention to the fact that, conceding the will to have been duly established and probated, the testimony shows that one of the three witnesses to the will was Newton Kolb, one of the devisees named in the will, and that, therefore, the devise as to him was void, under Code of 1871, § 1101, in force when the testator died, since he was a subscribing witness.

William Baldwin, for appellants.

Even if all these witnesses to this will, that is to say, if all three of them, Malloy, Morris and Newton Kolb, were to come into court and prove the will in due form, most certain it is that the will would be void, so far as the part of the land devised to Newton Kolb is concerned.

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Brief for appellees.

Newton Kolb was one of the alleged witnesses to this will, giving to him, Newton Golb, part of the land.

And the decree appealed from gives to Newton Kolb his full part. Code 1871, § 1101.

Surely the will could not be proved except by the name of Newton Kolb and if proved by the name of Newton Kolb, it is void as to any devise to him in the will, and as to the part devised to Newton Kolb, Joseph Kolb died intestate, and that part went to his widow, and at her death, belonged to her heirs, who are the defendants to this bill.

Leftwich & Tubb, for appellees.

It seems to us a far-fetched idea that the mere presence of the name of Newton Kolb as a witness on the face of the paper should forfeit his devise; that is not the language of the statute. That result was to follow only when the will could "not otherwise be proved," and it has otherwise been proved in this case, because Newton Kolb could not be called from the grave. If Newton Kolb of all the witnesses were alone alive and we had no secondary proof by which we could establish the will and we were compelled to call him as we doubtless would be, then his devise would be forfeited, but only then would it be forfeited. Many cases could be referred to if necessary to show that wills have been established not only in the absence of the testimony of the subscribing witnesses, but even contrary to their testimony. As the courts remarked in the cases here referred to, it is not to be tolerated that the devisees should lose their estate because of the death, loss of memory, or stupidity of perverseness of the witnesses to it who could not remember its legal execution. One witness proved a will when he does not remember the others. *Dan v. Brown,* 15 Am. Dec. 395.

The will may be established by circumstantial or presumptive evidence when all the witnesses testified it was not duly executed in some particulars. Note, *Welch v. Welch,* 15 Am. Dec. 126.

The presumption in favor of the due execution of the will

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when it appears on its face to possess all the legal requisites will prevail over the testimony of all the witnesses to the contrary. Note, *Jackson v. LeGrange*, 10 Am. Dec. 237.

Argued orally by *George J. Leftwich*, for appellee.

WHITFIELD, C. J., delivered the opinion of the court in response to the suggestion of error.

This will required, to be valid, three attesting witnesses. Joseph Kolb, the testator, died in June, 1880. The Revised Code of 1871, therefore, governs. Code 1871, § 2388, provides as follows: "If not wholly written and subscribed by himself or herself it [the will] shall be attested by three credible witnesses in case of the devise of real estate." The word "credible," in this statute, is synonymous with "competent."

Schouler in the second edition of his work on Wills (section 350), says: "By 'credible' witnesses the English law has understood such persons as were not disqualified from testifying in courts of justice by mental imbecility, crime or interest. In American practice 'credible' signifies the same as 'competent,' * * * and hence a person convicted of crime might in most states legally witness a will, and the fact of his conviction could only be used to impeach his testimony. Under the statute of frauds a will of lands was required to be attested by three or four credible witnesses. This was interpreted to mean competent witnesses and by the common-law rules as to competency. If a legacy or devise was given to a subscribing witness, he became incompetent by reason of interest, and the whole will failed, through failure of the proof requisite to establish the will." This rule, operating the gross injustice of defeating the whole will, was changed by the English statute (St. 25 Geo. II, c. 6), which provided that the will should only be invalid so far as the interested witnesses was concerned. Underhill, in his work on Wills (volume 1, § 82) says: "In the United States of America the incapacity of an attesting witness to take under

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the will is absolute, except there be the statutory number of attesting witnesses to establish the will without his testimony." See, also, sections 192, 193, vol. 1, of Underhill on Wills.

Code 1871, § 1101, reads as follows: "Sec. 1101. If any person shall be a subscribing witness to a will wherein any devise or bequest is made to such subscribing witness and the will cannot otherwise be proved, such devise or bequest shall be void, and the witness shall be competent as to the residue of the will as if no such devise or bequest had been made, and shall be compelled to testify."

What is it that is to be thus "otherwise proved"—the contents of the will, or the execution of the will? The history of legislation in England and the United States on this subject shows plainly that what is to be thus "otherwise proved" is the execution of the will. Wigmore on Evidence vol. 2, p. 1593, § 1304, par. 2, says: "Where a statute requires that execution be 'proved' by a certain number of witnesses, that number must be called, and each must presumably testify to all the elements of a valid execution." The following authorities show plainly that it is the execution of the will which is to be proved: Wigmore on Evidence, vol. 2, § 2048; Id. vol. 1, § 582; Id. vol. 4, § 2456; Schouler on Wills, §§ 353, 357. The language of Scouler's section 353 is, speaking of subscribing witnesses as to their competency and the disqualification arising from interest: "This policy extends to those beneficially interested who are not subscribing witnesses; and such persons cannot testify to the execution of a will." Underhill on Wills, vol. 1, § 82, says: "As this rule always resulted in defeating the entire will, it was enacted by St. 25 Geo. II, c. 6, that the will should only be invalid so far as the interested witness was concerned, and that he might testify as a witness as to its execution." To the same effect, that it is the execution of the will which is to be "otherwise proved," or "proved," is *Boone v. Lewis,* 103 N. C. 45, 46, 9 S. E. 646, 14 Am. St. Rep. 783. The court approvingly quotes as follows: "In *Taylor v. Mills,* 1 Moody & R. 288, it was held by Lord

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Denman, Chief Justice, that a devise to a subscribing witness to the will was void, although there were other witnesses, sufficient in number, to prove the will." To the same effect is *Sullivan v. Sullivan,* 106 Mass. 474, 478, 8 Am. Rep. 356, which points out that it is the execution of the will which is to be thus "proved," or "otherwise proved." In 1 Jarman on Wills (5th Am. Ed.) p. 192, St. 1 Vict. c. 26, § 14, is quoted, which is: "That if any person, who shall attest the execution of a will shall at the time of the execution thereof, or at any time afterwards, be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid." It is thus made perfectly clear that what in Code 1871, § 1101, it to be "otherwise proved" is the execution of the will, and not its contents.

The distinction which settles the controversy is this, as we gather it from the authorities: That the rule requiring three competent witnesses to a will devising land, where that number is required, since the statute of frauds was passed in 1678 (St. 29 Car. II, c. 3), is a rule of validity, and not a rule of evidence. In other words, since the statute required, when this will was made, three competent witnesses to a will devising land, and since a subscribing witness to whom a devise was made by that will was not competent because of his interest, the whole will would have failed prior to St. 25 Geo. II, c. 6, referred to, and now the legacy must fail. In other words, it is a rule of substantive law, and not a rule of evidence, that the written attestation of three competent witnesses to the will shall be essential to its validity; that is to say, this written attestation of three competent witnesses is, by the substantive law, made a solemn formality without the observance of which the will was absolutely void in its entirety, and is now void as to the legacy to the subscribing witness. It is not a mere matter of evidence. It is a positive requirement of substantive law, without strict compliance with which—that is to say, without the written attestation of the will by three competent witnesses—the will, as

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stated, was originally wholly void, and is now void as to the legacies or devises to interested subscribing witnesses. All this is made perfectly clear by the masterly treatment of the matter by Wigmore in his work on Evidence (vol. 4, §§ 2454–2456; section 582, vol. 1; sections 2048, 2049, vol. 3; section 1304, vol. 2). In section 2456, par. 3, vol. 4, he says: "The attestation of a document was originally not a formality to the validity of the document, but merely a precaution desirable for securing testimony to the transaction. The noting of the names of the witnesses on the document was thus only a memorandum for future usefulness. But the statute of frauds introduced, for wills, the act of attestation as a formality. This formality includes two things: First, the presence of the witnesses at the act of signature by the testator; and, secondly, the signature of the document by the witnesses. The two together thus constitutes an intrinsic element in the validity of the document." In section 582 of volume 1 he says: "Whether the person attesting a will is eligible as such is purely a question of the substantive law applicable to the validity of wills. The object of the statute is not to determine the competency of the persons called to testify to the will, but to secure the execution of the will under formalities of a special sort. * * * Certain corollaries ensue from this principle, and illustrate it. In the first place, the rule of validity, requiring attestation by certain persons, remains to be satisfied, whether or not any one of those persons appears as a witness. For example: The rule that certain of these persons must be called in preference to others to testify is a rule of evidence, independent of the rule of validity, and may be dispensed with, while the latter remains in full force." In section 2049 of volume 3, he says: "In the first place, the validity of the will, as to its formalities of execution, was affected [that is, by the statute of frauds]. The act of execution, after the statute, must include the act of signing by three witnesses. Without their co-operation, the will is void. Here is no matter of evidence, but of substantive law." In section 1304, vol. 2, p. 1593, he says: "From the above requirements of the

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present rule, the following doctrines must be distinguished: (1) by the substantive law, prescribing the elements of a valid execution, it may be necessary to prove signing, delivery, presence of the maker, and the like. Now, if the present rule in a given jurisdiction requires but one attestor to be called, and if he is unable to testify to all these elements, the present rule is satisfied; but the elements of the execution are not yet made out, so that the proponent may have to call others to prove the remaining facts of the case. This, however, is not because of the present rule, but because otherwise the requirements of his particular case, under the substantive law, are not fulfilled. It is to this that the common expression refers, in the rulings above cited, that 'one witness suffices, provided he can prove the requisites of a valid execution.' "

We think, from this masterly discussion by Prof. Wigmore and from all the other authorties, which we have carefully examined, that under Code 1871, § 1101, the devise to the subscribing witness, Newton Kolb, is void. It comes simply to this, under the law: That until St. 25 Geo. II, c. 6, was passed in England—reincorporated substantially in the laws of the different American states—a will of land which did not have the proper number of competent attesting witnesses was absolutely void, and that since that statute and other like statutes—we have Code 1871, § 1101, as applied to this case—not the whole will, but the devise or legacy to the interested subscribing witness, is void; in other words, the entire will, in the one case, fails because it does not have the solemn formality the substantive law requires it to have as essential to its validity of being attested in writing by the required number of competent witnesses; and now, not the whole will fails, but the devise or legacy to the interested subscribing witness fails, and that annulment of such devise or legacy to the subscribing witness leaves him competent, and so the required number of competent witnesses is furnished, which saves the will except as to the annulled legacy or devise.

We ought to add that on the oral reargument of this cause the

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attention of the court and of counsel was directed to the single proposition as to whether the will had been, by all the testimony in the case, legally established, and that consideration of the question raised by the suggestion of error, but which was pressed by counsel for the suggestion of error in his original brief, was not made prominent.

It follows from these views, that the suggestion of error must be, and it is hereby, sustained, and the original judgment will be corrected accordingly.

Suggestion of error sustained.

WARREN COUNTY v. THOMAS C. CATCHINGS.

[46 South. 709.]

PUBLIC LANDS. *Sixteenth section. School lands. Lands in lieu. Location. British grants.*

Where the title of a grantee in a British grant was confirmed by an act of congress, the secretary of the treasury was thereafter without power to locate the granted land as school lands, in lieu of a sixteenth section; such a location was absolutely void and not validated by the government's subsequent acquisition of title to the land.

FROM the chancery court of Warren county.

HON. J. S. HICKS, Chancellor.

Warren county, appellant, was complainant in the court below; Catchings, appellee, was defendant there. The lands in suit were claimed by the county as school lands in lieu of a sixteenth section. From a decree sustaining a demurrer to the bill of complaint and dismissing the suit the complainant appealed to the supreme court.

The land in controversy is situated in section 34, township 16, range 3, and overlaps section 21 of said township, several governmental surveys having been made of the locality. The articles of agreement and cession between the United States and the

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Statement of the case.

state of Georgia are to be found in the revised Code of Mississippi, 1857, page 645. On March 3, 1803, congress passed an act providing for the disposal of lands of the United States south of the state of Tennessee, which act provided that all lands acquired from the state of Georgia were to be offered for sale to the highest bidder, according to certain prescribed regulations; provided, however, that all sections numbered 16 should be reserved in each township for the support of schools. It also provided that the title to lands held by persons under former British and Spanish grants should be confirmed, and by its term, wherever a sixteenth section should fall upon land held by virtue of a British or Spanish grant, the secretary of the treasury was empowered to locate another section in lieu thereof for the use of schools. The secretary of the treasury found that section 16, township 16, range 3 east, had already been claimed by virtue of a British grant, and in lieu thereof set apart a body of land described as section 21, which included section 34 involved in this suit; section 34 containing only about 95 acres.

The bill alleged that the title of one John Girault was confirmed by act of congress to a certain British grant of land, a portion of which overlapped territory covered by section 21, and that this land was not public land on April 16, 1816, when the secretary of the treasury set apart section 21, which included the grant to John Girault, for school purposes in lieu of section 16. On May 7, 1822, the entire interest and claim of John Girault was relinquished to the United States, which then, for the first time, became the owner of the land covered by this British grant. The contention of the bill is that, by the acquisition of this title thus obtained by the United States, section 34, which is alleged to be included in section 21, immediately enured by operation of law to the state of Mississippi, in trust for the inhabitants of township 16, range 3 east, for school purposes. The bill charged that the trustees of the township never acquired possession of that portion of section 21 covered by the land embraced in the Girault claim. In 1834 William Vick

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and Anthony Glass entered the land known as section 34, which is concluded within the Girault grant, and obtained a patent therefor from the United States; and it is through them that appellee claims the property involved in this litigation, which is a part of said section 34. Appellant contends that the patent issued to Vick and Glass was void, and that appellee, therefore, has no title to the land in controversy.

Appellee demurred to the bill on the ground that the United States had no title to the property in question on April 16, 1816, when section 21 was set apart for school purposes, because the secretary of the treasury had no right to locate, in lieu of a sixteenth section, another section upon land already granted by an act of congress or claimed by virtue of a British grant; because the United States acquired title by purchase from Girault, and conveyed the same to those through whom defendant derives title; because by the terms of the act of cession from the state of Georgia and the acts of congress the title to all lands claimed by persons under British grants was confirmed in the owner, and could not be disposed of by the United States for any purpose whatever; because under the law (Code 1857, c. 57, § 1, and section 2, art. 25) the state is debarred from commencing any action for the recovery of the lands in controversy, except within ten years after the right of action accrued, and that, the right of action having accrued in 1822, this action was barred by the statute of limitations before the adoption of the constitution of 1890, exempting the state from the operation of the statute of limitations, because the state is estopped by its failure for eighty-five years to assert any title to the land in controversy.

McKnight & McKnight, for appellant.

By the demurrer it is admitted: That section 16, township 16, range 3, fell upon a British grant.

That section 21 was selected as lieu land in 1816 in accordance with a survey made by Thomas Freeman which marked

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out and defined said section 21 on the ground. That by said survey said section 21 contained 606 acres.

That a part of section 21, as laid down by the Freeman survey, was overlapped by a part of a British grant to one John Girault.

That there was no section 34 on the Freeman survey, which survey was made between 1810 and 1817.

That in 1828-1829 the government made a resurvey by which section 34, T. 16, R. 3, was created in part out of that part of section 21 which had formerly been covered by the claim of Girault, the eastern part of section 34 being "wedged in" between sections 22 and the remainder of section 21, T. 16, R. 3.

That the lot in dispute is a part of section 21 by the survey of 1816 and is included in that part of 21 which was covered by the Girault claim and is a part of that part of section 21 by the survey of 1816 which was cut off from section 21 and taken into the formation of section 24 by the resurvey of 1828 and 1829.

That after the resurvey of 1828 and 1829, William Vick and Anthony Glass undertook to enter a part of section 34, township 16, range 3, being the land covered by the Girault claim and including the land in dispute here,, and that their claims of right of entry were disallowed by Commissioner Wailes because the lands sought to be entered conflicted with the land reserved for the use of schools in the township.

That afterwards in 1834, said Vick and Glass renewed their claim to enter a part of section 34, when the then commissioner, Hayward, losing sight of the right of the inhabitants of the township and being governed by the resurvey in 1828, allowed the land, including the land in dispute, to be entered and issued patents therefor to certain parties under whom the appellee claims the land in dispute in fee.

That such portion of section 21 as was covered by the overlapping of the Girault claim belonged to Girault at the date of

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the selecting of section 21 in lieu of section 16 and that the date of this selection was April 6th, 1816, and it is also admitted that by authority of an act of congress passed May 7th, 1822, the legal representatives of Girault on April 10th, 1824, conveyed certain tracts of land, one of which included the land which overlapped section 21, township 16, range 3, unto the government of the United States of America and to their assigns, and it is also admitted that the schools have never gotten this land.

The obligation which rested upon the government to act in the matter of providing a lieu section for school purposes where section 16 had been covered by a British grant, arose under and by virtue of the solemn obligation imposed by the cession from Georgia to the United States and does not depend upon authority given by the act of congress of April 21, 1806. This act of congress was merely directory to the officers of the government in the performance merely of a solemn obligation created by the compact with Georgia and was not intended as a limitation upon or impediment to the fulfillment of that obligation. The right of the state rested in compact binding the public faith and dependent for execution upon the political authorities of the government, both before and after the passage of the act of April 21, 1806. *Jones v. Madison County,* 72 Miss. 777, 18 South. 87, and cases there cited.

The act of congress referred to does not use the term "public lands" but its provision is "whenever the section No. 16 shall fall upon land already granted by virtue of any act of congress, or claimed by virtue of a British grant, the secretary of the treasury, shall locate another section in lieu thereof, for the use of schools, which location shall be made in the same township, if there be any other vacant section therein, and otherwise in an adjoining township." From this it will be seen that instead of saying "public lands" the section used the expression "if there be any other vacant section therein." To place the construction

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upon this section which is sought to be placed thereon by the appellee in his demurrer would be, first, to make it entirely possible to deprive many townships of any school section at all, because by that strict construction under which this section is construed as a limitation or restriction upon the carrying out of the compact with Georgia, it would follow that in the case where a township in which section 16 was covered by a British grant, was surrounded by other townships in like condition with itself then the first township could have no school section because there was no public land either in it or in an adjoining township, and, second, to prevent the government from providing a section by acquisition from any source whatever. In other words, this construction goes to the ridiculous position that the laws of the United States of America prohibit any land from becoming school land if the title thereto has ever passed out of the government, although afterwards re-acquired by the government.

The fact that a portion of the land selected was claimed by Girault under a British grant which was confirmed as the effect of the general act of congress of 1812, did not prevent the government from acquiring the same from Girault, but, on the contrary, the government by confirming this claim was carrying out the terms of the compact with Georgia by which it was povided that the British grants should be confirmed. After this confirmation of Girault's claim he had the right to convey it to the government and the government had the right to acquire it and after the government acquired it there was nothing to prevent it from being selected as lieu lands and being used in carrying out the compact with Georgia, and it is begging the question to say that the provision in the act of cession and in the act of congress of April 21, 1806, which required the confirmation of British grants was in the nature of a covenant running with the land, preventing it from ever being acquired and used by the government in the performacn of its compact with Georgia.

If the government, after acquiring this property from Girault

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could patent it to those under whom the appellee claims, it would with equal power have selected and appropriated said land for school purposes in lieu of section 16.

If the government could appropriate this Girault land to school purposes after the relinquishment by the Giraults in 1824 then what was to prevent it from selecting it for schools and then acquiring it; and yet, according to the position of appellee, here rests the pivotal point in this case, to-wit: That the act of the government as to the selection of that part of section 21 which was overlapped by a part of a claim belonging to Girault at the time of the selection was absolutely void because such part of section 21 belonged to Girault and was not public land at the date of selection.

Against this proposition the appellant's contention is that the government was under the compact obligation with Georgia to provide a section of land in lieu of section 16 wherever section 16 had already been taken and finding section 16 had been taken in township 16, range 3 east of Warren county the government selected section 21, a part of which was overlapped by a part of the claim of one Girault, and with a section selected and approved, a part of which was public land and a part of which was not, the government acquired the title of Girault to itself and to its assigns and that when the government acquired the title of Girault to his claim in said section it was estopped to say that it had not conveyed to the state in perpetuity the land acquired from Girault, but that the title acquired by the government from Girault enured immediately to the state, or else that the state being the assign of the government took directly under the conveyance from the Giraults by virtue of the terms of said conveyance whereby the Girault claim was conveyed unto the government of the United States of America and to their assigns.

Every element necessary to the operation of the doctrine of estoppel by causing the title acquired by the government in 1824

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Brief for appellee.

from Girault to enure to the state of Mississippi in trust for schools is present in this case.

The selection and approval of section 21 as lieu land was all that was necessary to pass title to the state in trust for schools. *McCreery v. Haskell,* 119 U. S. 327.

The admission of a state into the Union vested it with title to all 16th sections or to lieu sections, as the case might be, without further grant or patent. *Hendricks v. Hughes,* 15 Wall. (U. S.) 123.

The title which the government undertook to convey by its selection and approval of 21 as lieu land for schools was not a quit claim as was contended by appellee in the court below, but was a perfectly legal title. 6 Ballard, sec. 710; *Hagan v. Ellis,* 39 Fla. 463, 22 South. 727.

Catchings & Catchings, for appellee.

The following authorities conclusively establish our contention. *Jones v. Madison County,* 72 Miss. 777, 18 South. 87; *Rabb v. Board of Supervisors of Washington County,* 62 Miss. 589; *Board of Supervisors v. East Mississippi Mills Co.,* (Miss.) 16 South. 210; *Grown v. Supervisors,* 54 Miss. 230; *Hargis v. Inhabitants of Congressional Township,* 29 Ind. 70; *Miller v. State,* 38 Ala. 600; *Burks v. Mitchell,* 78 Ala. 61; *Warren County v. Lamkin,* (Miss.) 46 South. 497; *Hedrick v. Hughes,* 15 Wall. (U. S.) 123, 21 L. Ed. 52; *Steel v. Smelting Company,* 106 U. S. 452, 1 Sup. Ct. 389, 27 L. Ed. 226; *Best v. Polk,* 18 Wall. (U. S.) 117, 21 L. Ed. 805; *Polk v. Windel,* 9 Cranch. 99, Fed. Cas. No. 11, 251; *Wilcox v. Jackson,* 13 Pet. (U. S.) 511, 10 L. Ed. 264; *Wright v. Roseberry,* 121 U. S. 519, 7 Sup. Ct. 985, 30 L. Ed. 1039; *Stoddard v. Chambers,* 2 How. (U. S.) 284, 11 L. Ed. 269; *Jackson v. Dilworth, Secretary of State,* 10 Ga. 772; *Clement v. Anderson,* 72 Miss. 522; *Beard v. Federy,* 3 Wall. (U. S.) 491, 18 L. Ed. 88; *Rice v. R. Company,* 1 Black (U. S.) 358, 17 L. Ed. 147; *Irvine v.*

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Irvine, 9 Wall. (U. S.) 625, 19 L. Ed. 800; 11 Am. & Eng. Ency. 393; *Childress County Land & Cattle Co. v. Baker,* 23 Tex. Civ. App. 451, 56 S. W. 759; 26 Am. & Eng. Ency. 428; *Leavenworth R. Co. v. U. S.,* 92 U. S. 733, 23 L. Ed. 634; *Kansas Pac. R. Co. v. Dunmeyer,* 113 U. S. 629, 5 Sup .Ct. 566, 28 L. Ed. 1122; *Hastings & Dakota R. Co. v. Whitney,* 132 U. S. 357, 10 Sup. Ct. 112, 23 L. Ed. 363; *Bardon v. Northern Pacific R. Co.,* 145 U. S. 535, 12 Sup. Ct. 856, 36 L. Ed. 806; *King v. McAndrews,* 111 Fed. 863, 50 C. C. A. 29.

Argued orally by *Theodore McKnight,* for appellant and by *T. C. Catchings, pro se.*

CALHOON, J., delivered the opinion of the court.

About ninety-five acres of land in the city of Vicksburg, including the lot in controversy, were patented to Vick and Glass in 1834. They, and those claiming under them, down to and including appellee, have had possession under claim of ownership undisputed for over eighty years. Before the patent to Vick and Glass, and at the time of the "articles of cession and agreement" between Georgia and the United States on April 24, 1802, the land belonging to one John Girault. Girault then had title in virtue of a British grant. By act of congress of March 3, 1803, the lands of the Georgia cession were authorized to be sold, reserving, however, the sixteenth section in each township for the support of schools, and also providing that those holding under British and Spanish grants should be confirmed in their grants. These British and Spanish grants are also distinctly recognized in the acts of congress of March 27, 1804, March 2, 1805, and April 21, 1806. By this last act of April 21, 1806, it is declared that lands held by British grants "shall not be disposed of until otherwise directed by congress," and that when a section 16 falls within such a grant "the secretary of the treasury shall locate another section in lieu thereof for the use of schools," etc.

The title of Girault was confirmed by congress June 30, 1812,

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Statement of the case.

2 Stat. 765, c. 110. With matters in this situation, on April 6, 1816, the secretary of the treasury located the Girault lands for schools in lieu of section 16. This location, under which appellant claims, and by which it must stand or fall, was without power, and was an absolute nullity, and the patent to Vick and Glass in 1834 was perfectly valid, and the decree sustaining the demurrer of appellee to the bill was correct. We are content with the authorities cited in the brief for appellee on this point, and do not lengthen this opinion by discussion, because it is unnecessary. While this much settles the case, and while it is unnecessary for the court to consider in consultation the other question, still, for myself, having carefully examined it, I am absolutely convinced that the bar of the statute of limitations was complete and perfect long before our constitution of 1890.

Affirmed.

WIRT ADAMS, STATE REVENUE AGENT v. SAMUEL R. BULLOCK ET AL.

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[47 South. 527.]

FRANCHISES. *Municipalities. Waterworks. Taxation. Mode of assessment.*

The grant by a city of the exclusive privilege of constructing and operating a waterworks plant therein, and to use the streets for the purpose:—

(a) Is a franchise;

(b) Is property;

(c) Is taxable as personalty; and

(d) Is not embraced in an assessment of "capital invested in merchandise and manufacturing."

FROM the circuit court of Warren county.

HON. J. N. BUSH, Judge.

Adams, state revenue agent, appellant, was plaintiff in the court below; Bullock and others, appellees, were defendants there. From a judgment in plaintiff's favor, but denying him a

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large part of the recovery sought, he appealed to the supreme court. The facts are stated in the opinion of the court.

Bryson & Dabney, for appellant.

If the assessment of "Capital invested in merchandise and manufacturing" embraced the franchise in question then there is no error in the action of the court below, but if, on the other hand, it did not, the court below erred in holding that it did and the case must for that error be reversed and remanded.

We think that this case is controlled by the case of *Vicksburg Bank v. Adams,* 74 Miss. 179, 27 South. 401, in which it was held that "money on hand, on deposit or at interest" did not include or describe the capital stock of the bank and that the capital stock was therefore still assessable.

In this connection we desire further to call the attention of the court to the fact that by another agreement made with counsel for the Vicksburg Water Supply Company, being the only appellee interested up to the year 1901, both parties ask for an affirmance of the judgment below up to and including the year 1900, leaving only the back assessments for the years 1901, 1902, 1903, 1904 and 1905 to be adjudicated.

McLaurin, Armistead & Brien, for appellees.

The court will take judicial knowledge of the form of the printed list to be furnished tax-payers, as set out in Code 1892, § 3761, and the court will notice that nowhere in this itemized list furnished tax-payers is there any detailed statement of how the assessment of the capital stock of a joint stock company, such as appellees, shall be detailed in this printed list, as provided for by Code 1892, § 3758.

It is averred in this record and also held by the court below that where the appellees had listed their property as such joint stock company, as provided by Code 1892, § 3758, and the assessor had put it upon the tax roll of the county under some heading mentioned in Code 1892, § 3761, such as "capital employed in merchandise and manufacturing" or "capital employed

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Brief for appellees.

in business" and such assessment is paid on by the tax-payer, as is not denied in this record, certainly this property has not escaped taxation so as to bring it within the power of the revenue agent to list it again for taxation on the ground that it was not properly enumerated on the tax roll after having been properly given in to the assessor. *Adams v. Luce,* 87 Miss. 220, 39 South. 418.

It is not denied in this record that these appellees have paid to the state and to the county of Warren taxes on the capital stock they have employed in these joint stock companies and that they have listed it properly to the assessor and that the state and county have received the taxes due from these tax-payers, as provided by law; and yet, it is seriously insisted by the attorneys for appellant, that notwithstanding the facts shown above, the tax-payer can be again shorn by the strong arm of the state and made to pay a double tax by going into what constitutes the "market value" of the capital stock of a "joint stock company or corporation" as provided by Code 1892, § 3758, and reassess the franchise, earnings, profits and capital employed, notwithstanding the tax-payer has paid on the capital stock of which these items make the market value.

The court below very properly held that this could not be done; that these items very necessarily constituted the market value of the capital stock of a joint stock company or corporation and that when such corporation had paid on the market value of its capital stock, it necessarily included the franchise and the franchise could not be again assessed for taxation. The fact that the assessor listed the capital stock as "capital employed in business" and that the taxes were paid on it in this form certainly would not be made a means of punishing the tax-payer by double taxation; and that is what is sought to be done in this case.

Under the rule announced by this court in *State v. Simmons.* 70 Miss. 485, 12 South. 477, and *Bank of Oxford v. Town of Oxford,* 70 Miss. 504, 12 South. 203, the action of the court below in this case was entirely correct.

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Opinion of the court.

MAYES, J., delivered the opinion of the court.

In 1886 the mayor and board of aldermen of the city of Vicksburg granted to Samuel R. Bullock & Co., their associates, successors, and assigns, the exclusive right and privilege of erecting, maintaining, and operating a system of waterworks in the corporate limits of the city of Vicksburg, and to effectuate this grant also gave them the exclusive right to use the streets, alleys, public squares, and all other public places in the city limits as they existed or might afterward be extended. This privilege was shortly thereafter transferred to the Vicksburg Water Supply Company, and in 1900 by it transferred to the Vicksburg Waterworks Company, and the Vicksburg Waterworks Company transferred it to the City Waterworks & Light Company about the year 1903.

On June 4, 1906, the revenue agent began a proceeding before the board of supervisors, through Robert B. Hall, tax assessor of Warren county, the object of which was to assess for taxation for the county and state the franchise granted by the city of Vicksburg to the said Samuel R. Bullock & Co., their successors, etc., from the years beginning with 1887 to 1905, inclusive, claiming that said franchise had escaped taxation.

There were numerous exceptions filed to the assessment returned to the board of supervisors by the tax assessor, finally resulting in the board sustaining the assessment of the franchise on the ground that it had escaped taxation for the several years named in the assessment of same; and, after modifying the value placed on same by the tax assessor, the board ordered that the franchise be placed on the rolls for taxation. From this order of the board of supervisors an appeal was prosecuted to the circuit court by all the parties against whom the assessment had been made, and the cause was heard on the different pleadings filed by the waterworks company and the revenue agent.

We do not deem it necessary to set out in detail the numerous exceptions, demurrers, pleas, etc., which were filed in this cause, since by agreement of counsel the question in this case is reduced

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to a very narrow limit. It is agreed that the value of the franchise for the years 1887 to 1905, inclusive, is $5,000 for each of said years, except for the year 1887, and for that year it is agreed that the franchise had no value. On the hearing the parties waived a jury, and submitted the issues involved to the court. The judgment of the court was that the Vicksburg Water Supply Company was liable for taxes on its franchise at the agreed valuation of $5,000 for the years 1888, 1889, 1890, and 1891, only, and further holding that for each of the years 1892 to 1905, inclusive, the assessment given in as "capital employed in business" and "capital invested in merchandise and manufacturing" included the franchise, and it was therefore not assessable, and should be stricken from the rolls. It having been agreed that the franchise was valueless for the year 1887, the court ordered the assessment for that year stricken out.

An agreement filed in the record shows that an adjustment has been reached of all differences involved in this litigation prior to the year 1901, and this appeal is prosecuted by the revenue agent from that part of the judgment of the court holding that the franchise is not liable to taxation for the years 1901 to 1905, inclusive. The only question involved now is whether the franchise is now liable to taxation as having escaped taxation for the years 1901, 1902, 1903, 1904 and 1905. The agreed assessment rolls of Warren county show that the Vicksburg Waterworks Company was assessed on the personal rolls for state and county taxes for the years named above as follows: For the year 1901, 1902, and 1903 the assessment was for "capital invested in merchandising and manufacturing." This is the only assessment of any kind of property to the Vicksburg Waterworks Company on the rolls of the county. After 1903 the property had been sold to the City Water Works and Light Company, and on the personal rolls the City Waterworks & Light Company is assessed for the two remaining years—that is, for 1904 and 1905—with "capital invested in merchandise and manufacturing."

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Opinion of the court.

The real question presented for decision is: Where property is listed for taxation under the description of "capital invested in merchandise and manufacturing," can it be said that the value of the franchise is included? There can be no doubt but that the grant of the exclusive privilege to construct a waterworks plant in the city of Vicksburg and the right to use the streets for this purpose is the grant of a franchise within the narrowest definition of the word. It is the grant of a valuable right, constitutes property, and is taxable. It is distinct in its nature from any sort of property which may be described for purposes of taxation as "capital invested in merchandise and manufacturing" and is not included within such description any more than if the omitted property were horses or other property of like character. Section 178 of the constitution of 1890, contemplates the assessment for taxation of corporate franchises. This franchise is the property of a private corporation organized for pecuniary gain, and under section 181 of the constitution is taxable in the same way, and to the same extent as if owned by an individual. In a certain sense this franchise is capital, but for purposes of taxation it is not "capital invested in merchandise and manufacturing" because it is salable, and therefore valuable to the party owning same, though not a dollar of capital be invested in its operation. If owned by an individual, this franchise would be taxable as property not comprehended under the list as "capital invested in merchandise and manufacturing." Therefore, since under section 181 of the constitution corporations of this class are to be taxed as individuals, the franchise being owned by a corporation is none the less liable. That this exclusive privilege is a franchise, and that a franchise is property and taxable, is settled by section 178 of our constitution, and seems to be settled by the almost unanimous decision of all courts, but the courts are wanting in harmony in their decisions as to what character of property it is; that is to say, whether real or personal. See notes to case of *Louisville Tobacco Warehouse Co. v. Commonwealth of Kentucky*, 106 Ky.

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165, 49 S. W. 1069, 57 L. R. A. 33. We adopt the view of such courts as hold that a franchise of this character is personal property and taxable as such. The capital stock of the companies was never assessed in the county and state, but it was assessed in the municipality for the years of 1904 and 1905, but the listing of the capital stock would not relieve the water companies from the necessity of listing the franchise for taxation as personal property. The capital stock has its taxable value, and the franchise, being personal property of a distinct kind, has a taxable value of its own. In the case of *Panola County v. Carrier & Son,* 89 Miss. 277, 42 South. 347, it is clearly shown how corporations of this character should be taxed. In the case of *Maestri v. Board of Assessors,* 110 La. 517, 34 South. 658, the city of New Orleans granted to Maestri the exclusive privilege to build a public market house on certain ground to be furnished by the city, and to operate it as such for twenty-five years by renting stalls to those engaged in the market business, and to collect and appropriate to himself the rent and revenue derived from the stalls. At the time the building was erected, the ordinance making the grant provided that Maestri would convey to the city at the beginning of his lease the ground and the market house thereon, and at the expiration of the twenty-five years, the full ownership of same should be in the city. Afterwards the board of assessors undertook to assess this franchise for taxation, and the court held that this privilege was a franchise, a valuable grant, and as such constituted property and was liable to taxation. In this case there will be found many cases cited, all to the effect that the grant by the sovereign power of any exclusive valuable right is a franchise and taxable property, whether it be in form of a contract or some other manner of giving the right. The case of *Mayor and Board of Aldermen of the City of Vicksburg v. Vicksburg Waterworks Company,* 202 U. S. 453, 26 Sup. Ct. 660, 50 L. Ed. 1102, involved a very different question from the one presented in this case, and the decision there in no way

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affected the contentions in the case now before this court. In the case just cited the controversy arose over an attempt by the city to place a competitive waterworks system owned by itself in the city of Vicksburg after granting the exclusive right to maintain a waterworks system to the waterworks company, and the court held that the city could not do it. That was the only question involved in that case. There was involved in the case just cited no question of the right to tax that exclusive privilege. The fact that the court there held that the city was precluded by its contract from establishing its own system in competition with the waterworks company is proof conclusive that the grant is a valuable franchise. The question of the power of the municipality to exempt from taxation the value of the plant in excess of $50,000 for the period of time during which the contract is to run is not directly involved in this case, and we decline to pass on this contention at this time.

It appearing from the agreement filed that all matters in dispute are adjusted up to the year 1901, what we say in this case has no application to any period of time prior to the year 1901, but the judgment of the court below must be reversed and the case remanded, and the franchise held to be liable for taxes for the years 1901, 1902, 1903, 1904, and 1905.

Reversed and remanded.

ABNER L. JOHNSON v. TOWN OF PHILADELPHIA.

[47 South. 526.]

1. NUISANCES. *Skating rink.*

A skating rink is not a nuisance *per se.*

2. SAME. *Municipalities. Ordinances. Reasonableness.*

The power of a municipality to pass ordinances is subject to the implied restriction that they shall be reasonable, consistent with the general law, and not destructive of lawful business.

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Brief for appellant.

3. SAME. *Example of void ordinance. Code* 1906, § 3340.

A municipal ordinance requiring skating rinks to be closed at six o'clock in the afternoon or evening, and remain closed until six o'clock the next morning, is an unreasonable exercise of the power (Code 1906, § 3340) to regulate, suppress and impose a privilege tax on skating rinks, and is void.

FROM the chancery court of Neshoba county.

HON. JAMES F. MCCOOL, Chancellor.

Johnson, appellant, was complainant in the court below; the town of Philadelphia was defendant there. The object of the suit was to enjoin the enforcement of an ordinance requiring skating rinks to close at six o'clock in the afternoon or evening and remain closed until six o'clock the following morning. From a decree in defendant's favor the complainant appealed to the supreme court. The facts are stated in the opinion of the court.

G. E. Wilson and *E. S. Richardson,* for appellant.

It is not contended by appellee in this cause by proof that the operation of the said skating rink was a nuisance. The proof is overwhelming that the rink was orderly conducted; that it was attended by the best people of Philadelphia for their pleasure, recreation and physical benefit.

The case of *Levin v. Goodwin,* 114 Am. St. Rep. 616, is in many ways similar to the one at bar. Suit was instituted to enjoin the operation of a bowling alley in the second story of a building adjoining that occupied by complainant. Defendant pleaded a license granted him by the board of police and the lower court held that the plaintiff would have substantial relief if the operation of the alleys should be discontinued at night between the hours of ten o'clock p. m. and six o'clock a. m. This judgment was reversed and the appellate court said: "A license to keep a bowling alley granted by municipal authorities under power conferred on them by the legislature, protects the person licensed, though such maintenance by the making of

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noises operates as a substantial disturbance of the occupants of adjacent property and results in their pecuniary loss, if the bowling alley is constructed and operated in the usual manner and with the usual safeguards. The operation of a bowling alley cannot by the court, be restrained to certain hours of the night to relieve occupants of adjacent property from noise, if such alleys have been licensed by the municipal authorities, acting under a power conferred on them by the statute." Further the court says: "The judge of the superior court seems to have based his finding in favor of the plaintiff upon the ground that the plaintiff would have substantial relief from further disturbance and loss if the operation of the alleys should be discontinued at night, between the hours of ten o'clock p. m. and six o'clock a. m. This may be true, but the court had no authority to change the hours named in the license, or to offer the plaintiff relief so long as the conditions of the license were complied with." In the case at bar appellant has secured from appellee a license for the operation of his business, without any modification, and, according to the proof in the case, he had done nothing which his license did not authorize him to do under any reasonable construction of the contract. The license had only been granted him a few days prior to the passage of the ordinance in question, which in effect was to suppress the business of appellant, since it is proven in this case and a matter of common knowledge that to prohibit the operation of a skating rink in a small town after six o'clock p. m. amounts to suppression.

C. L. Dobbs, for appellee.

Police power is said to be "that inherent sovereignty which it is the right and the duty of the government or its agents to exercise whenever public policy in a broad sense demands, for the benefit of society at large, regulations to guard its morals, safety, health, order, or to insure in any respect such economic conditions as an advancing civilization of a highly complex

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character requires." 8 Cyc. 863; 18 Am. & Eng. Ency. of Law (2d ed.) 739.

Municipalities have the right to control and regulate places of amusement, hawkers, pedlers, locations of livery stables, market houses, and in fact anything that in any way interferes with the public convenience, welfare, safety, morals, health or expediency. In *State v. Pamperin,* 42 Minn. 320, billiard rooms and bowling alleys are expressly included. 15 Am. & Eng. Ency. of Law (2d ed.) 1181. In a number of cases cited in 15 Am. & Eng. Ency. of Law (2d ed.) 1188, note 2, it is held beyond question that under this general welfare provision of our law it was within the authority and jurisdiction of the board of aldermen to order saloons and other like institutions, even restaurants, to be closed at certain hours.

The present court at its last term in our humble judgment, has forever settled this case in the case of *Crittenden v. Booneville,* 92 Miss. 277, 45 South. 723, wherein it was held that while a municipality might not have the right to prohibit the actual operation of any business which had been licensed, yet it had full power to regulate the same.

May, Flowers & Whitfield, on the same side.

The question involved is answered conclusively and settled beyond all question in this state by Code 1906, § 3340, which says that "the mayor and board of aldermen shall have the power to regulate, suppress and impose a privilege tax on all * * * skating rinks," etc.

The meaning of this section is plain. The statute speaks for itself. It says in plain and simple words that the mayor and board of aldermen shall have power to regulate, suppress * * * pool rooms * * * skating rinks, etc.

The ordinance is one, the purposes of which is merely to regulate, and not to suppress, skating rinks and pool rooms in the town of Philadelphia. The meeting of the board was regular; the ordinance was passed according to the law prescribed for

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Opinion of the court.

the passage of ordinances and to our minds it must stand. Certainly there can be no question as to the right of the board to regulate, within reason, the hours of an enterprise as noisy, in the very nature of the thing, as a skating rink. If this were not true, why could not a rink on every corner, with the noise attending it, be operated all night and not a person in Philadelphia be allowed to sleep?

MAYES, J., delivered the opinion of the court.

The town of Philadelphia derives its power as a municipal corporation from the Code chapter on municipalities. On January 24, 1907, its mayor and board of aldermen passed the following ordinance, viz:

"Sec. 1. Be it ordained by the board of mayor and aldermen of the town of Philadelphia, Mississippi, that the poolrooms, billiard parlors, dance halls, and skating rinks, doing business at this time or hereafter, in said town, shall close at six o'clock p. m. and remain closed until six o'clock a. m. and that any person managing or operating any such poolroom, dance hall or skating rink after six o'clock p. m. and before six o'clock a. m. or any person found playing pool or billiards, dancing or skating in any public hall or place herein between such hours shall be fined not less than $5 nor more than $100, or be imprisoned not more than thirty days, or both.

"Sec. 2. Be it further ordained that the necessities and interest of the town demanding it this ordinance be in full force and effect after this date."

At the time the above ordinace was passed, Johnson was conducting a skating rink in the town of Philadelphia, having previously paid all state and municipal taxes, and, after the passage of the ordinance he procured an injunction against the town of Philadelphia enjoining the enforcement of the ordinance on the ground that it destroyed his business, was unreasonable, and void.

The great preponderance of testimony shows that Johnson

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conducted his business in an orderly manner, and that he allowed no such conduct in his place of business as would warrant the board of mayor and aldermen in suppressing it. But, if this were not true, the ordinance plainly shows that it was enacted under Code 1906, § 3340, giving municipalities the power "to regulate, suppress and impose a privilege tax on all circuses, shows, theaters," etc., "skating rinks, * * * and other like things." If we were disposed to consider this ordinance as an ordinance suppressing a nuisance, it could have no validity, as a skating rink is not a nuisance *per se,* and no general declaration of the mayor and board of aldermen, through the medium of an ordinance declaring it to be a nuisance, without any notice to the party conducting the business and without reference to the fact of whether it is in fact a nuisance, can make it so.

Into every charter power given a municipality to pass by-laws or ordinances there is an implied restriction that the ordinances shall be reasonable, consistent with the general law, and not destructive of a lawful business. It is manifest that, if Johnson is not allowed to operate his skating rink except between the hours of six o'clock a. m. and six o'clock p. m., business will be destroyed. His is a place of amusement, and so far as this record shows, a place of innocent amusement, the main business of which is done after six o'clock p. m. Under pretense of regulating a business, the business attempted to be regulated cannot be destroyed. This was not the intention of the legislature. If the legislature had intended that amusements of this character could be prohibited by a municipality, they would have said so in unequivocal terms.

In Freund on Police Power, section 63, it is said: "There is implied in every delegation of power to a municipal corporation a condition that the power must be exercised reasonably, and that therefore every unreasonable ordinance is *ultra vires,* and the court in treating it as null and void merely enforces the legislative will and principles or policies embodied in it."

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And again, in section 158, it is further said: "The requirement of reasonableness is so general in its nature that it allows the courts to exercise a very efficient control over ordinances without being under the necessity of formulating in each case a principle which would be a guide for other cases."

The section of the Code giving a municipality the power to regulate and suppress gives no power to prohibit. Skating rinks and such like can be suppressed only when as a fact they become nuisances, and when they are regulated it must be in a reasonable way. In McQuillin on Municipal Ordinances, p 79, it is said: "The power 'to regulate' will not be construed to include the power to prohibit. 'A power simply to regulate does not embrace a power to prohibit or destroy a trade or occupation.' Therefore ordinances to be valid cannot interfere with lawful employment."

The fact that the state law authorizes the conducting of the business is evidence that it was in contemplation of the law that the places should exist. *State v. Mott,* 61 Md. 297, 48 Am. Rep. 105; Dillon on Municipal Corporations, § 325.

In the case of *Crittenden v. Booneville,* 92 Miss. 277, 45 South. 723, the court said that the power given the municipality, under Code 1906, § 3340, "to regulate, suppress and impose a privilege tax on all circuses, shows,' etc., does not carry with it the power to prohibit, unless it is in the exercise of the police power to suppress a nuisance. The municipality may regulate; that is to say, it may provide the hours during which these places may keep open, etc., and if the conduct of the owner is such as to warrant so doing, or if the place is conducted in a boisterous or immoral way, so as to become a nuisance, it may suppress altogether. But the power to regulate and suppress when the business has become a nuisance is one thing and the power to pass a general ordinance prohibiting the operation of a pool-room, which has been legalized by the statute, is another thing. The first a municipality has the power to exercise. The second it is without power to do."

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Syllabus.

We can establish no fixed and permanent guide to settle in future cases what is and what is not a reasonable exercise of the power of regulation. Each case must largely be determined by its own facts. In the *Crittenden case* we held that the municipality may provide the hours during which a place of business of the character under discussion may be kept open, etc., yet, when the hours prescribed ruin the business under the guise of regulating, such a regulation is unreasonable.

The nature of the business being conducted forms an element for the consideration of the court in determining whether or not an ordinance is unreasonable as an ordinance regulating a business. It is unreasonable to say that a skating rink shall be kept open only between the hours of six a. m. and six p. m., and such ordinance cannot be upheld. Rights cannot be stealthily taken away under the power to regulate. The power to regulate is given for a wholesome purpose. It is a defensive power of municipalities, and not a weapon of destruction.

Reversed and remanded.

CITY OF CORINTH v. MACK CRITTENDEN.

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[47 South. 525.]

1. POOL AND BILLIARD ROOMS. *Police power of state.*

Pool and billiard rooms are within the police power of the state and may be regulated or prohibited at legislative will. *Crittenden v. Booneville*, 92 Miss., 277, 45 South., 723, explained.

2. MUNICIPALITIES. *City of Corinth. Laws* 1884, *p.* 547, *ch.* 403. *Privilege taxes. Code* 1906, § 3893.

The special charter of the city of Corinth (Laws 1884, p. 547, ch. 403), still in force, grants express power to prohibit the keeping of pool and billiard rooms; and an ordinance of the city prohibiting them is not affected by the privilege tax laws of the state, since they (Code 1906, § 3893) provide that the payment of taxes thereunder shall not legalize any business.

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Brief for appellee.

FROM the circuit court of Alcorn county.

HON. EUGENE O. SYKES, Judge.

Crittenden, appellee, was plaintiff in the court below; the city of Corinth, appellant, was defendant there. The suit was an application for a writ of prohibition to prevent the enforcement of an ordinance of the city prohibiting pool and billiard rooms. From a judgment in plaintiff's favor the defendant appealed to the supreme court. The facts are fully stated in the opinion of the court.

Lamb & Johnson, for appellant.

The court below erred in overruling the motion of the city of Corinth to dissolve and vacate the writ of *certiorari* and prohibition granted appellee in this case for the reason that the ordinance, for the violation of which appellant was tried and convicted, was passed and adopted by the board of mayor and aldermen under and by virtue of a power expressly and specifically granted the city of Corinth in section 8 of the charter; this provision of the charter is purely a local law, and no part of it has been expressly repealed by any subsequent act of the legislature, except that portion of the same, which provides that the board of mayor and aldermen, if they deem it expedient to license poolrooms, may tax the same in a sum not to exceed $150; it has not been repealed by implication because of any repugnance between this special act and the general law legalizing the business of operating poolrooms and *providing* for licensing the same. The state of Mississippi had a right, under its police power, to prohibit the operation of public poolrooms throughout the state, and, having this power, it delegated the same to the city of Corinth.

Sharp & McIntyre, for appellee.

All that part of section 8 of the charter of Corinth pertaining to the prohibition of poolrooms, etc., is repugnant to the constitution and general laws of the state; our general laws

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make and declare the operation of poolrooms to be a legitimate business and our legislature has legalized the operation of same; if the business is a legitimate one and legalized in all other parts of Mississippi, why should it be illegitimate and unlawful in the city of Corinth? Why should a citizen, so long as his business does not interfere with the rights of others, or the peace, health or safety of the community, not have the same rights and privileges in Corinth as in all other cities in the state?

The mere act of playing pool or billiards may be and often is a harmless and an innocent amusement—it is to be remembered that the operation of a billiard table or a poolroom is not wrong in itself, it is not violative of the morals necessarily and is not denounced by law; on the contrary it is legalized—nowhere under the law are they prohibited. *Crittenden v. Booneville,* 92 Miss. 277, 45 South. 723.

If the law prohibits that which is harmless in itself or requires that to be done which does not tend to promote the health, comfort, safety or welfare of society, it will, in such cases, be an unauthorized exercise of power, and it would be the duty of the courts to declare such legislation void. *Toledo, etc., R. Co. v. Jacksonville,* 67 Ill. 37, 16 Am. Rep. 611.

MAYES, J., delivered the opinion of the court.

The city of Corinth is operating under a special charter, and has never adopted the Code chapter on municipalities. The charter of Corinth is found in Laws 1884, p. 547, c. 403. In December, 1906, the mayor and board of aldermen of the city of Corinth, acting under the powers granted by section 8 of its charter, wherein the city is given the power to restrain or prohibit the keeping of billiard tables, pool tables, etc., within its borders, passed an ordinance making it unlawful for any person or persons to engage in the business of operating and running a poolroom, billiard room, etc., in the corporate limits of the city of Corinth. In April, 1908, long after this ordinance

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Opinion of the court.

was adopted, Crittenden obtained from the sheriff of the county in which is located the city of Corinth, state privilege license authorizing him to operate a poolroom. After procuring state license, he made an application to the city of Corinth for municipal license, which the city refused to issue because of the ordinance prohibiting it. Crittenden thereupon tendered to the city clerk, fifty per cent of the amount of state tax, and, the city refusing to accept same or to issue a municipal license, he opened a poolroom and undertook to conduct the business in defiance of the ordinance, whereupon he was arrested, and sought and procured a writ of prohibition against the authorities of the city of Corinth, prohibiting them from taking any further action looking to the enforcement of the ordinance. On the hearing in the court below the writ of prohibition was sustained, the ordinance declared void, and the city appeals.

The case of *Crittenden v. Town of Booneville,* 92 Miss. 277, 45 South. 723, is not authority in this case. The facts in the *Booneville case* disclose that the town of Booneville was operating under the Code chapter on municipalities, and the general law on the subject of municipalities applied. The city of Corinth has express power under its charter to prohibit the keeping of poolrooms, and this charter power supersedes the general law. The charter of the city of Corinth antedates the adoption of the constitution of 1890, and, when granted by the legislature, did not remotely conflict with any constitutional provision of the state. Being lawful at the time it was granted, it is still a valid charter in all its provisions, even though it conflict with the general law; the city of Corinth never having adopted the Code chapter. Code 1906, § 3440, which is Annotated Code 1892, § 3035, expressly provides that existing municipalities shall not be affected by the general municipal law, unless adopted by such existing municipality, except as to certain provisions made applicable to all municipalities, but the power in question is not disturbed by the sections generally applicable to all municipalities.

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Opinion of the court.

In the case of *Lum v. City of Vicksburg*, 72 Miss. 950, 18 South. 476, it was held that the general law which was to govern municipalities was prospective, and in no way violated sections 80 and 88 of the constitution of the state, and, further, that the existing charters were not repealed by the general law. The legislature gave to the city of Corinth the power to prohibit poolrooms, billiard tables, etc., and in the exercise of that power the city of Corinth passed an ordinance making it unlawful to conduct the same in its borders. This was a valid ordinance, and had the effect of outlawing the poolroom business in that city, and under Code 1906, § 3893, the payment of the privilege tax to the state by Crittenden could afford him no protection when prosecuted by the city authorities. Section 3893 expressly provides that "nothing in this chapter, nor the payment of any privilege tax herein provided, shall legalize any business, employment, transaction, article, or device of any kind, or the operation thereof, in violation of any statute of the state or the ordinances of any municipality therein now existing, or that may be hereafter adopted." This section of the Code was intended to fit this precise case.

While the general law provides for the licensing of poolrooms, such a business comes well within the police power of a state both to regulate or prohibit. The evil tendency of such places is known to all mankind. In them no good is promoted, but they too often prove to be nurseries of idleness and such evils as naturally result therefrom. The keeping of a poolroom or a billiard room can be considered a lawful business only so long as the legislature makes it so, and only in such places as the law allows. Such places may be prohibited at any time the legislature deems it proper to do so, and the influence of such places is not much less corrupting than is that of a dramshop.

The ordinance is valid, the writ of prohibition granted should have been dismissed, and Crittenden left to adjust the matter with the city as best he can.

Reversed and remanded.

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ALBERT J. VINCENT v. SAMUEL R. CORBETT.

[47 South. 641.]

1. DECEIT, ACTION OF. *Pleadings. Declaration. Demurrer. Representations. Knowledge of falsity.*

A declaration in an action of deceit for false representations is demurrable if it neither charges that the representations were made by defendant with knowledge of their falsity, nor pleads such facts as impute knowledge thereof to him.

2. SAME. *Evidence.*

To maintain an action of deceit for false representations it must be shown that the representations were made with actual knowledge of their falsity, or—what is the equivalent of conscious misrepresentation—that they were made recklessly and without regard to their truth or falsity.

3. SAME. *Scienter.*

The scienter must be charged and proved in actions of deceit; but it is sufficient to show that the false representations were made as of defendant's own knowledge, when he was without knowledge, or when, because of his position, he should have known their truth or falsity.

4. SAME. *Matter of fact. Area of cleared land in tract.*

A statement by an owner of a tract of land that a designated number of acres thereof was cleared is an averment of a fact and not the expression of an opinion, and, if false, an action of deceit can be predicated of it.

5. SAME. *Evidence. Prima facie case.*

Proof of a false statement by defendant touching the area of cleared land in a tract he was seeking to sell, materially overstating the number of acres, and that plaintiff bought on the faith thereof, makes out a *prima facie* case against the vendor in an action of deceit by the vendee, although plaintiff gave defendant credit for an honest mistake.

FROM the circuit court of Washington county.

HON. SYDNEY SMITH, Judge.

Vincent, appellant, was plaintiff in the court below; Corbett, appellee, was defendant there. From a judgment in de-

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Brief for appellant.

fendant's favor, predicated of a peremptory instruction, plaintiff appealed to the supreme court. The facts are fully stated in the opinion of the court.

Percy & Moody, for appellant.

The defendant, acting by his agents, falsely represented the boundaries of the land so as to induce the belief that the entire tract of cleared land, with the six houses, were located on the land sold, that the appellant relied upon these false representations, and by reason of his belief that they were true was induced to make the purchase, whereby he was damged, are facts so well established by the evidence that they cannot be controverted. It is, however, contended that the evidence showed that defendant, or his agents, did not know the falsity of these representations at the time the same were made; that to sustain this action it is necessary for the plaintiff to show something beyond the bare falsity of the information upon which he acted in making the purchase; that it is necessary for him to have shown that the representations were knowingly false, or that they were so recklessly made as to amount to knowledge of their falsity.

There is a vast distinction between the liability of a party making a false representation honestly, to another's injury, whereby the person making the representation does not derive any profit, and where a person makes a false representation honestly to his own gain, and to another's injury. In the former case a recovery is permitted because of the fraudulent character of the representations, in other words, to punish the party for his fraud, while in the latter a recovery is permitted on the theory that one should not be permitted to pocket gains by false representations. In other words, in the latter case, the law does not allow the action to punish the untruth, but as a compensation to the party injured by its consequences. The true principle on which a recovery is permitted in the latter case is well stated in one of the authorities. "He who affirms either

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what he does not know to be true, or knows to be false, to another's prejudice and to his own gain is, both in morality and law, guilty of falsehood, and must answer in damages."

The seller who owns the land and who proposes selling it, must be presumed to know more about the lines and what land is embraced within the tract than the buyer. In this case whether he did or did not, he assumed to know the fact that certain good land, which formed an inducement to the purchase, was included, and he, by his agents, asserted this as a fact, upon which the appellant relied and might well rely in concluding the bargain. He thus induced the purchase upon his false statement of a matter of fact, and pockets the gains, and he should not when sued, say "I did not know that I was telling an untruth." It is sufficient that he misrepresented the fact and did not care that he did so—in other words, that he asserted as true and as matter of knowledge that which was untrue, and which he either knew nothing about or knew to be false. In either case he has been benefited and another injured. 20 Cyc. 45 *et seq.*, and notes; *Ib.* 55; *Cottrill v. Krum*, 18 Am. St. Rep. 549; *Mitchell v. Zimmerman*, 51 Am. Dec. 717; *Tyson v. Passmore*, 44 Am. Dec. 181; *Lynch v. Mercantile Trust Co.*, 18 Fed. Rep. 486; *Ainslie v. Medlycott*, 9 Ves. 21; *Brooks v. Hamilton*, 15 Minn. 31 (Gil. 10); *Porter v. Fletcher*, 25 Minn. 493; *March v. Walker*, 40 N. Y. 562; *Munroe v. Pritchard*, 50 Am. Dec. 203.

In conclusion we rest our case upon the following quotation from the opinion of the court in the case last cited: "He who affirms either what he does not know to be true, or knows to be false, to another's prejudice, and his own gain, is, both in morality and law, guilty of falsehood and must answer in damages."

However, "did the law allow the action to punish the untruth, and not as a compensation to the party injured by its consequences, then it would be proper to make the action depend (as contended by appellee's counsel) upon the *scienter;* but the action is for the injury sustained by reason of the reck-

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Brief for appellee.

less, false assertion of the vendor, which was calculated to deceive, and did deceive the purchaser—consequences which to him are precisely the same, whether the vendor knew or did not know or care to know that the assertion was false."

Campbell & Cashin, for appellee.

Where a vendee seeks a rescission of a contract of sale, on the ground of false representations, or sues to recover damages for a false warranty, knowledge, on the part of the vendor of the falsity of the representations or warranty, is immaterial, and need not be alleged or proved, in order to maintain his suit, as has been repeatedly decided in this state; but where he sues for deceit, or fraudulent representations, as contra-distinguished from a false warranty, knowledge, on the part of the vendor, that the representations were false, when made, or want of an honest belief in their truth, is essential, and must be alleged and proved in order to maintain the action. An action of deceit cannot be maintained if the false representations are made in the honest belief that they are true. That is the rule established by the weight of authority, and especially by adjudications in this state. 14 Am. & Eng. Ency. of Law, 86; 20 Cyc. of Law and Procedure, 24, 35; 8 Ency. Pl. & Pr. 901; *Kountze v. Kennedy,* 49 Am. St. Rep. 65; Note to *Cottrell v. Krum,* 18 Am. St. Rep. 555; *McLeod v. Tutt,* 1 How. (Miss.) 288; *Taylor v. Frost,* 39 Miss. 328; *Mizell v. Sims,* 39 Miss. 331; *Sims v. Eiland,* 57 Miss. 83, s. c. p. 607.

The doctrine announced in *Estell v. Myers,* 54 Miss. 174, does not militate against that rule, for in that case, false representations were treated by the court as warranties, and, in that point of view, the decision of the court is in harmony with the rule stated in the outset of this brief, that where the false representations are warranties, knowledge of their falsity is immaterial.

Aside from the fact that the case of *Estell v. Myers,* was in chancery where the doctrine of constructive fraud as contra-

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distinguished from fraud in fact, is often applied, recoupment, when relied on in a court of law is treated as an equitable defense, and as involving a failure of consideration. As was said by the court in *Myers v. Estell,* 47 Miss. 18, in speaking of the doctrine of recoupment, "it looks through the whole contract, treating it as an entirety, and treating the things done, and stipulated to be done on each side, as a consideration for the things done and stipulated to be done on the other. When either party seeks redress for a breach of the stipulation in his favor, it sums up the grievances on each side, instead of the plaintiff's side only—strikes a balance, and gives the difference to the plaintiff, if it is in his favor."

In 2 Warvelle on Vendors, sec. 903, it is said that: "The simple fact of falsity in representation, however, whether made with respect to situation, condition, quality or quantity, will not ordinarily furnish a defense to an action for purchase money, unless such representations were made fraudulently and with intent to deceive the purchaser;" and, in that connection, citing *Estell v. Myers, ubi supra,* it is there further said: "An apparent deviation from this rule has been permitted in some instances upon the ground that the representations might justly be regarded as warranties, and for breach of which the purchaser might recoup in damages when sued upon the contract; but this has only been permitted in extreme and clearly defined cases."

Here, as will be seen, the author cites *Estell v. Myers* as an apparent deviation from the rule announced by him, that false representations are not a defense to an action for purchase money, unless such representations were made fraudulently and with intent to deceive the purchaser; and that the deviation from the rule was allowed in that case on the ground that the false representations were treated by the court as warranties.

If the contract of sale, in *Estell v. Myers,* had been fully executed, and not executory in part, as it was, and the purchaser had brought suit at law against the vendor to recover damages

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Brief for appellee.

for the same false representations, basing his action upon them as warranties, could he have maintained his action in the face of the deed, which spoke the whole contract between the parties, and which was silent as to any such warranties?

We respectfully submit that the deed would merge all warranties, and would be the sole exponent of all matters of contract between the parties; and that, if there were false representations inducing the contract, such representations would only be the basis of an action of deceit in a court of law. 14 Am. & Eng. Ency. of Law (2d ed.) 29, 101; *Mizell v. Sims,* 39 Miss. 331.

Perhaps, the true ground of the decision of the court in *Estell v. Myers,* although being in a court of equity, should have been, not that the representations there made, were warranties, but were false and fraudulent, and that the evidence and circumstances of the case were sufficient to charge the vendor with knowledge of their falsity, or want of an honest belief in their truth. Be that as it may, the numerous decisions of our supreme court theretofore rendered to the effect that in an action of deceit for false and fraudulent representations, knowledge or its equivalent, of their falsity must be alleged and proven, in order to maintain the action, were not referred to in *Estell v. Myers,* nor was the doctrine announced in those decisions in any way shaken or modified, for in the later case of *Sims v. Eiland, ubi supra,* which was an action of deceit, the decisions prior to the ruling in *Estell v. Myers,* were cited with evident approval, and the doctrine announced by them reaffirmed.

So, it remains true, in this state, that in an action of deceit for false and fraudulent representations, regarding the sale of land, or of other subject matter, it is incumbent upon the plaintiff to allege and prove, in order to recover, that the defendant made the representations with knowledge of their falsity, or without an honest belief in their truth.

That the instant case as originally brought was, and as amended is an action of deceit, pure and simple, and not for a

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false warranty, is plain and unmistakable. The declaration does not allege any warranty, nor indicate that the alleged false representations were so treated, but, on the contrary, it alleges that said representations were "deceitfully, falsely and fraudulently" made; and, according to *Taylor v. Frost,* 39 Miss. 328, grounding a complaint upon false, fraudulent and deceitful representations, and failing to aver a warranty, makes the action, in form and legal effect an action of deceit. *Ross v. Mather,* 51 N. Y. 108.

FLETCHER, J., delivered the opinion of the court.

Appellant, Vincent, purchased from appellee, Corbitt, and Frank Trimble, partners engaged in the business of buying and selling lands, the land described as the S. E. ¼ of section 4, township 22, range 6. Adjoining this land, and with nothing to mark the boundary between, was the S. W. ¼ of the same section belonging to one Barker. The purchase price was $5,040, which was fully paid by Vincent. The transaction was had between Vincent and Trimble, one of the partners, and Trimble represented to Vincent, before the purchase was made and also at the time of the purchase, that the land sold contained sixty-five acres of cleared land and six tenant houses. After the delivery of the deed and the payment of the purchase money, Vincent discovered that fifty acres of the cleared land were in fact a part of Barker's tract, and that he (Vincent) got only fifteen acres of cleared land. It was further ascertained that one of the tenant houses, which had been represented as being on his (Vincent's) land, was in fact situated on the land of Barker. Thereupon, after fruitless efforts to secure a settlement, Vincent instituted an action of deceit against Corbitt and Trimble, claiming damages for the false and fraudulent representations; but, being unable to secure service upon Trimble, the cause proceeded against Corbitt alone.

The original declaration failed to charge that these false representations were made with knowledge of their falsity on the

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part of the vendors, and because of this omission a demurrer to the declaration was successfully interposed. However, leave being granted to amend, an amendment was made averring that the representations were made "without knowledge or well-founded belief in their truth on the part of defendants." On the trial Vincent testified to the facts above set forth, and stated that the prospect of securing this quantity of cleared land was a material inducement to the purchase; that Trimble and the witness had ridden by the land two or three times on the train; that Trimble stated positively on more than one occasion, and at the time the deal was closed, that the tract which he proposed to sell contained the entire sixty-five acres of cleared land and all six of the tenant houses; that as a matter of fact a subsequent survey showed that he (witness) got only fifteen acres of cleared land and one cabin less than had been represented; and that the cleared land was worth $30 per acre more than uncleared land. He stated, however, that in his opinion, Trimble was honestly mistaken about the land, and had not been guilty of any intentional fraud or willful deceit. There was further shown by a surveyor the location of the true boundary line between the two tracts. This being all the evidence of the plaintiff, the court excluded the evidence and directed a verdict for the defendant, and plaintiff prosecutes this appeal.

It is the contention of appellee that this action of the lower court was correct, since there was no proof that the false representations were knowingly made, but that, on the contrary, plaintiff gives it as his opinion that Trimble made an honest mistake and did not intend to defraud. It is therefore argued that, since knowledge on the part of a vendor of the falsity of a representation is the gist of an action of deceit, there can be no recovery in such an action unless such knowledge is shown. It is pointed out in this respect that an action of deceit differs from an action for a breach of warranty, since in the latter action it is enough to show that a material warranty has failed, and the question of knowledge is immaterial. This rule as to

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actions of deceit is broadly stated in 14 Am. & Eng. Ency. of Law (2d ed.), 86, where it is said: "By the overwhelming weight of authority, in order to render a person liable for false representations in an action of deceit it must be shown that he made the representation *scienter;* that is, either with actual knowledge of their falsity, or under such circumstances that the law will imply or impute knowledge, as in the case of reckless statements without knowledge, whether they are true or false, representations made for a fraudulent purpose, though without actual knowledge of their falsity, and representations accompanied by a false assumption of knowledge, express or implied. As a general rule, an action of deceit cannot be maintained if a false representation is made in the honest belief that it is true."

While due weight must be given to the necessity for alleging and proving that declarations were made with knowledge of their falsity, regard must also be had for the equally well settled principle that statements recklessly made and statements made as of knowledge, when in fact no such knowledge exists, are in law considered as the equivalents of conscious misrepresentations. The doctrine is thus aptly put: "In actions of deceit, the charge of fraudulent intent is maintained by proof of a statement made, as of the party's own knowledge, which is false, provided the thing stated is not merely a matter of opinion, estimate, or judgment, but is susceptible of actual knowledge; and in such case it is not necessary to make any further proof of an actual intent to deceive. The fraud exists in stating that the party knows the thing to exist when he does not know it to exist, and, if he does not know it to exist, he must ordinarily be deemed to know that he does not." *Chatham Furniture Co. v. Moffatt,* 147 Mass. 403, 18 N. E. 168, 9 Am. St. Rep. 727. It is further said in 14 Am. & Eng. Ency. of Law (2d ed.), 99: "To bring a case within the principle above stated, it is not necessary that the party who has made the false statement of fact shall have unqualifiedly declared

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himself possessed of knowledge, or, in other words, that he shall have asserted in express terms that he knew his statement to be the truth. If a person makes a positive and unqualified false statement of a fact which is susceptible of knowledge, an affirmation of knowledge is implied from the positive character of the statement, and, if he has no knowledge, he is guilty of actual fraud."

It will be observed that these authorities do not go to the extent of holding that it is not necessary to allege and prove the *scienter*. This view has to do solely with the method and the *quantum* of proof. It is applicable here, because the question before us for discussion is whether plaintiff, when he completed his testimony, had made a *prima facie* case, calling for explanation by the defendant. Upon this precise point the observations of the Pennsylvania court in *Griswald v. Gebbie,* 126 Pa. 353, 17 Atl. 673, 12 Am. St. Rep. 878, are pertinent. It is there said that: "In an action of deceit, *scienter* must not only be alleged, but proved; and the jury must be satisfied that the defendant made the statement knowing it to be false, or with such conscious ignorance of its truth as to be equivalent to a falsehood. But the plaintiff in such action has made out a *prima facie* case, without direct proof of deceitful intent, when he has proved that the defendant made a positive statement of a material fact, its falsity, and the circumstances under which it was made, tending to show a reckless assertion in conscious ignorance of the fact." We have been cited to many cases holding, in effect, that the better rule in actions of deceit is that it is not necessary to allege and prove knowledge of the falsity of the representations on the part of the vendor; but we are not prepared to follow these cases in all respects. We think the true rule, or at least the one supported by the decided weight of authority, is expressed in the extracts quoted above, and especially the following statement found in 8 Ency. Pl. & Pr., at page 905: "It is not always necessary, however, to prove that the defendant actually knew the falsity of his representa-

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tions; *scienter* being sufficiently proven by showing that the representation was made as of knowledge, when in fact the defendant was without knowledge upon the subject, or when, by reason of his position, he should have known the truth or falsity of the representation made. These qualifications do not form exceptions to the rule that *scienter* must be proven, but relate only to the manner in which it should be shown."

We cannot escape the conclusion that the plaintiff in the case at bar brought himself within the scope of this sensible and salutary rule. Certainly Vincent had a right to assume that the owners of the property knew whereof they spoke when they assumed to state that the cleared land was on the property sold. The statement was manifestly one of fact, and not opinion, and was made as of knowledge. True, plaintiff gives it as his opinion that Trimble made an honest mistake; but, after all, this can only be a matter of opinion. It was not pretended to be based on any facts which would explain the source and reason of the opinion. We cannot hold that this charitable opinion of the plaintiff is sufficient to relieve the defendant from the duty of overthrowing the *prima facie* case arising from the showing as to damage which has resulted from a misrepresentation of a material inducement to the purchase, made presumably in conscious ignorance of the truth, and hence in the eyes of the law made recklessly and fraudulently.

We write this in full view and after careful consideration of the cases of *Sims v. Eiland,* 57 Miss. 83, *Mizell v. Sims,* 39 Miss. 331, and *Taylor v. Frost,* 39 Miss. 328. *Sims v. Eiland,* carefully considered, does not, in our opinion, militate againsst our holding. The only question squarely before the court for decision in that case was the sufficiency of a replication to a plea averring that the defendants "honestly believed" that the representations were true; and the court holds that it is a good answer to such a plea to aver that defendants had no reasonable ground to believe that such representations were true, for, says Judge CAMPBELL, "one cannot believe what he has no reason-

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able grounds to believe." Here we hold no more than that Trimble, having made an emphatic assertion of a fact, should be required to disprove the presumption of knowledge which is thereby created, and disclose, if he can, what reasonable grounds existed for his belief. *Mizell v. Sims* turns upon the form of the action, and the court does no more than to decide that in an action based upon a breach of warranty where the warranties are expressed in a written instrument, contemporaneous verbal representations cannot be considered, because the suit is not the common-law action of deceit. *Taylor v. Frost* involves the correctness of certain instructions given after full proof, and does not necessarily involve any consideration of presumption or the requisites of a *prima facie* case. The opinion does, indeed, say that it is incumbent on the plaintiff to show knowledge on the part of the vendor; but there was no necessity in that case for consideration of the question as to how that knowledge may be proven.

We have carefully examined the exhaustive note to *Cottrill v. Krum* (Mo. Sup.), 18 Am. St. Rep. 549, and, so far from being shaken in our position, we are confirmed therein, especially in view of the language employed on page 559, where it is said: "To make a party liable in an action at law for false representations, it must be shown that he made the representations with actual knowledge of their falsity, or without knowing whether they were true or false, or under such circumstances that he ought to have known that they were false, whether he did or not." The authorities cited in support of this statement are numerous and of the highest order of respectability. We have also examined *Kountze v. Kennedy,* 147 N. Y. 124, 41 N. E. 414, 29 L. R. A. 360, 49 Am. St. Rep. 651, and, while there are some observations in this case growing out of its own particular facts which seem to be at variance with our announcement, yet the court is at pains to say, in effect, that a statement made without knowledge of its truth or falsity, and not caring what the fact may be, is made recklessly, and

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amounts in law to the same thing as actual, positive knowledge of the falsity.

In justice to the learned judge below, we feel it our duty to say that he was doubtless misled, in the hurry of a *nisi prius* trial, by the language employed in the Mississippi cases referred to, especially *Taylor v. Frost, supra,* and such language might well mislead the most careful and learned judge, called on to decide a close question without opportunity to reflect or examine authorities.

It follows, from these views, that, while we approve of the action of the court in sustaining the demurrer to the original declaration, the peremptory instruction should not have been given, and the judgment is therefore *reversed and the cause remanded.*

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BELZONI OIL COMPANY ET AL. v. YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY ET AL.

[47 South. 468.]

1. CORPORATIONS. *Adoption of officer's act. Estoppel. Deeds.*

A written agreement giving a license to a railroad company to locate and use a spur track over the land of a corporation, though signed by its president in his individual name, is the contract of the corporation if it knew of the long use of the track for its benefit and acquiesced therein, and it is estopped to claim that it did not execute the agreement.

2. LICENSE. *Right given by agreement. Railroad spur track.*

A writing in the form of an agreement between an oil company and a railroad company, and the successors and assigns of each, reciting that the oil company desired side tracks to facilitate its business, and wherein the oil company agreed to furnish the needed ground and give the railroad company the exclusive possession thereof so long as the agreement lasted and to do the grading and furnish the ties, and by which the railroad company was to construct the tracks and be the owner of them, and the materials therein, with the right on thirty days' notice to

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Statement of the case.

abandon the use of them and remove the materials, confers a mere license, not coupled with an interest in the land, and does not grant an estate or easement.

3. SAME. *Revocation. Refunding expense money.*

A mere license to maintain a spur track on the land of the licensor is revocable without refunding to the licensee any sum on account of expenditures made by him in laying the track.

4. INJUNCTION. *Chancery pleading. Amendment of bill.*

In determining whether an injunction granted on an original bill shall be dissolved, an amended bill should be looked to; and it will not be dissolved where the same injunction in effect should be granted on the amended bill, which is at the same time under consideration.

5. SAME. *Amending bill. Changing cause of action.*

An amended bill does not change the cause of action, where the foundation fact, a certain agreement for a spur track of a railroad, is the same, and the other facts are practically the same, except that the pleader draws different conclusions and makes different special prayers for relief; the object of both bills for injunction being the same, to enable another railroad than defendant to run its track into complainant's yard, the first bill drawing the conclusion that the materials in the track were complainant's property, the agreement under which the road was constructed on its land having been made without its authority, and praying that defendant be restrained from interfering with the crossing of and connection with the track by the other railroad, and the amended bill drawing the correct conclusion that the agreement was a license, which complainant had revoked, and specially praying that defendant be restrained from using the land for the track and be required to remove it.

FROM the chancery court of Washington county.

HON. PERCY BELL, Chancellor.

Consolidated suits, in one the Yazoo & Mississippi Valley Railroad Company was complainant one Cassleman, the president of the Belzoni Oil Company and the Delta Southern Railway Company, were defendants; in the other the Belzoni Oil Company was complainant and the Yazoo & Mississippi Valley Railroad Company was defendant. From a decree, seemingly unsatisfactory to all parties, the oil company and others appealed

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to the supreme court and the railroad company and others prosecuted a cross-appeal.

The facts are fully stated in the opinion of the court.

Campbell & Cashin, for appellant and cross-appellee.

In *Wheelock v. Noonan,* 108 N. Y. 179, a mandatory injunction was granted to compel the removal of a large quantity of stone from plaintiff's land, placed there by the defendant under a license, which he had abused, and also which had expired, on the ground that the stone constituted a continuous trespass, which involved, for its redress, a multiplicity of suits; and in *Broome v. New York, etc., Co.,* 42 N. J. Eq. 141, a similar injunction, on the same ground, was granted, commanding the removal from plaintiff's land of a number of poles; and the jurisdiction of chancery courts to grant mandatory injunctions, and, to do so in proper cases upon interlocutory application, is so firmly established as to obviate the necessity of citing authorities. However, numerous cases showing various circumstances and conditions under which such injunctions have been granted, are collected in the note to *Murdock's case,* 20 Am. Dec. 398, and in the note to the *City of Moundville v. Ohio River Co.,* 20 L. R. A. 161, and in the latter note, it is shown that it is no longer necessary that such injunctions should be in a negative or prohibitory form, but that the tendency, in the present day, is for the court to say, in the first instance, what it means, and direct the removal of the injury by a plain command to that effect.

In *Alcorn v. Alcorn,* 76 Miss. 907, 25 South. 877, the granting of a preliminary mandatory injunction was sustained, the court saying, in effect, that while such injunctions are granted with great caution prior to a full hearing, nevertheless, they are to be granted prior thereto, "where the exigencies of the case are great;" and in *Gulf Coast Co. v. Bowers,* 80 Miss. 570, 32 South. 113, the court recognized the propriety of granting a preliminary mandatory injunction, saying that "it

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is a sound rule that a writ of this character should not issue, unless the right to it is so satisfactorily shown that there can be no reasonable doubt of its propriety. The case made should be such that there can be no probability that the defendant can make a valid objection to it;" and, "unless the grounds for a preliminary injunction be inexpungable, it is the safer rule to hear both sides before directing its issuance."

In section 2 of High on Injunctions, it is said that "where, upon interlocutory application it is clear that the plaintiff will be entitled to a final mandatory injunction, an interlocutory mandatory injunction may be allowed. And, when there is a wilful and unlawful invasion of the plaintiff's right against his protest and remonstrance, the injury being a continuing one, a mandatory injunction may be granted in the first instance."

The record in this case shows with what stubborness the Yazoo, etc. Railroad Company has sought to prevent said crossing and connection, and to hinder said oil company in the management and control of its affairs and property, by the continuous occupany of the oil company's land with its tracks. It based its right of occupancy upon the written contract between it and S. Castleman, who had no interest whatever in the land; and alleged acquiescence therein by the oil company, resulting from its said tracks; and, in all of its pleadings, first, in its original bill, and then in its answer to the oil company's bill, and then in its amended and supplemental bill, and then by the affidavits of the several witnesses, it refers to said contract with said Castleman, as the basis of its right; while the affidavits, in behalf of the oil company, clearly showed that neither it, nor any of its directors, other than said Castleman, ever knew of the existence of said contract; and everything, in support of the railroad company's claim of the oil company's acquiescence in said contract, or its estoppel growing out of its use of said tracks, was presented to the chancellor as fully as it is likely could be done on the final hearing. So that, the substantive facts relied

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on by said railroad company, to-wit: said contract with Castleman, and the use of said tracks by the oil company were duly presented to the chancellor by the pleadings, exhibits and affidavits; and the chancellor, seeing that, on the final hearing, the oil company would be entitled to a mandatory injunction, granted it on the preliminary hearing.

The contract with Castleman, by virtue of which said tracks were constructed, was, in legal effect, nothing more than a license, and, even if he had been the owner of the land, the license thereby given, was revocable at will; for it is settled by the weight of authority that a mere license, whether for valuable consideration, or where great expense has been incurred by the licensee in pursuance of the license, is revocable at the will of the licensor. *Beck v. Louisville, etc. R. Co.*, 65 Miss. 172, 3 South. 252; *Kremer v. Chicago, etc. R. Co.*, 38 Am. St. Rep. 468; note to *Lawrence v. Springer*, 31 Am. St. Rep. 712, and it makes no difference whether the license is oral or in writing. 25 Cyc. 645.

In some states, when a licensee has acted under the license, and has incurred expense in making valuable improvements, or otherwise, equity regards it as an executed contract, or ground of equitable estoppel, and will not permit it to be revoked; but, in the note to *Lawrence v. Springer, ubi supra,* the authorities *pro* and *con* on that proposition, are collected; and it is there said that the line of cases holding revocability of the license under such circumstances is founded upon the better reason; and, among the cases there cited as supported by the better reason is *Beck v. Louisville, etc. R. Co., ubi supra,* wherein our supreme court repudiated the doctrine that acquiescence on the part of the owner of the land, in the building of a railroad thereon, at great expense, will estop him from recovering the land, and held that the owner could enjoin in chancery the use of said land for the railroad.

The contract with Castleman, upon which said railroad company relies, provides that Castleman should furnish the land

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needed for the construction of the tracks, but does not use a single word of grant or transfer, or as showing any intention to vest any interest in the land to the railroad company. On the contrary, it is therein expressly stipulated that the tracks should be and remain personal property, and no part of the real estate, and that the same could be removed by the railroad company at any time on thirty days' notice; and since the contract contained no words of grant or transfer, and by its terms excluded all intention of vesting any interest in or claim to the land occupied by the tracks, the true construction and legal effect of the contract, was to confer upon the railroad company a mere license, and as such, revocable even by said Castleman, had he been the owner of said land.

At the time said tracks were constructed, the railroad company assumed that said Castleman was the owner of said land, and the oil company did nothing to aid, encourage, or mislead the railroad company in making the expenditures necessary to construct the tracks.

The oil company's title to the land was on record, and it did nothing to mislead the railroad company in regard thereto. Nor did it do or say anything to induce the railroad company to incur the expense of constructing said tracks. All that was done by the oil company was to look on in silence, and to allow, without objection, the railroad company to use said tracks; and that did not amount to estoppel. *Staton v. Bryant,* 55 Miss. 261; *Sulphine v. Dunbar,* 55 Miss. 255; *Murphy v. Jackson,* 69 Miss. 403, 13 South. 728; *Hill v. Nash,* 73 Miss. 849; and *Beck v. Louisville, etc. R. Co.,* 65 Miss. 172, 3 South. 252.

Having undertaken to show that the court did not err in granting the mandatory injunction on the oil company's amended bill, we will now undertake to show briefly that the court did err in dissolving the injunction theretofore granted on the oil company's original bill.

Had the oil company's amended bill made a new and different case from that made by its original bill, or materially

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changed the object sought by the latter bill, the injunction theretofore granted on the latter bill might with propriety have been dissolved, regardless of the state of the case made by the amended bill; but there was no material or practical difference in the object sought by the two bills, nor did the amended bill state a different case.

It is true that the amended bill in its statement of the facts and its prayer for an injunction was framed in language somewhat different from that used in the original bill; but practically, in both, one and the same object was sought, and that was to enable the Delta Southern Railway to reach the oil mill over the right of way, which the latter had conveyed to it.

Mayes & Longstreet and *C. N. Burch,* for appellees and cross-appellants.

The decree of the court below dissolving the injunction granted on the original bill of the Belzoni Oil Mill Company is correct; a careful reading of that bill will conclusively demonstrate that the action of the court below was not only eminently proper, but was unavoidable.

The theory of the original bill of the Belzoni Oil Mill Company and the main alleged equity on which the relief prayed by it is founded, is wholly untenable under the law or admitted facts of the case. In no phase of the law and under no construction of the contract, could the Belzoni Oil Mill Company claim to have acquired ownership of the spur tracks, switches, etc., of the Yazoo & Mississippi Valley Railroad Company. The amendment allowed at the hearing, striking out paragraph 4, did not change the nature of the bill or of the character of the alleged right asserted by it. The chancellor could not find that by the course of dealings between the parties and the transfers of the land, that the Belzoni Oil Mill Company was the owner of these tracks, switches and appurtenances; therefore, it being clearly apparent to the chancellor that the allegations of ownership were untrue and unsupported by law

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and the evidence, he had no alternative except to disallow this claim and then to dissolve the injunction which had been founded on it.

The court below erred in allowing the filing of the amended bill and in allowing the amendments thereto after the hearing was practically ended.

It is undoubtedly true that this amended bill set up an entirely new cause of action, totally dissimilar to that asserted in complainant's original bill. The amended bill did not merely extend or elaborate any claimed equity adverted to in the original bill, nor does it assert a proposition in any wise germane to or kindred with the alleged equity of the original bill. The theory of the amended bill was entirely at variance with the theory of the original bill. The original bill asserted ownership in complainant; the amended bill asserted ownership in the defendant. The original bill denied all right and authority to the defendant; the amended bill asserted a limited right and authority in the railroad company. It would be difficult to conceive of any pleading which could so reverse the positions and controversies of the parties to the litigation. *Wright v. Frank,* 61 Miss. 35.

The chancery court erred in declaring that the contract of May 22, 1900, granted to the Yazoo & Mississippi Valley Railroad Company only a license, revocable in the first instance by Castleman or later by the Belzoni Oil Mill Company, the owner and grantee of the lands in possession at the beginning of this litigation, and further that the Belzoni Oil Mill Company had revoked such license.

In the first place it will be observed by the court that in the original bill in this case, the ownership of the tracks was claimed to be in the Belzoni Oil Mill Company, and by the second bill filed on the 13th of September, 1907, to be in the Yazoo & Mississippi Valley Railroad Company. The amended bill was filed fourteen months after the original bill was filed, and in and by this bill, it is claimed that the presence of the

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tracks of the Yazoo & Mississippi Valley Railroad on the lands of the Belzoni Oil Mill Company is a trespass and they seek to have them abated as a special nuisance. There is nothing in this last or amended bill by the Belzoni Oil Mill which avers that it, as an organized company and the then owner of the lands on which the tracks are located, had by any official action of the corporation, revoked or attempted to revoke the so called license of the Yazoo & Mississippi Valley Railroad. There is no proof in this whole transcript of any official action by the Belzoni Oil Mill Company peremptorily revoking the so called license of the Yazoo & Mississippi Valley Railroad Company, or giving notice by said corporation in an official way to the Yazoo & Mississippi Valley Railroad Company of such revocation and of any requirement that the tracks should be removed.

As there was no proof of final revocation by the corporation, that the court below could have found, from any of the evidence in the case, peremptorily, that the Belzoni Oil Mill Company had revoked the license and ordered the removal of the tracks. The threat to a railroad company that "unless you grant certain privileges we will compel you to remove your track" is a very different thing from formal action by the board of directors saying to this railroad company that "as you have refused these privileges, we will now deny ourselves the advantages of track connections with you and you must move out."

It is true that as a rule grants of certain privileges by parol are held to be merely licenses, revocable at the will of the person who is claimed to have granted them, and the policy of such rule is justified on the theory that serious rights in and about realty should not be allowed to rest on and be determined by mere parol agreements, but it does not follow that where a privilege has been granted in writing, it stands on the same plane with verbal agreements, or may be revoked at the will and pleasure of anyone.

There are abundant authorities to the effect that where a

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license has been granted and the licensee has entered on the premises and made valuable improvements and expended money; that such licenses are not revocable as long as the business conducted under them serves the original purpose and design of the license. To such effect are the following authorities: "A license coupled with an interest is irrevocable." *Railroad v. Hall,* 135 Ind. 91. "A telegraph company which has executed a written license to construct its line along a railroad right of way, by the expenditure of money in the construction of the line, has acquired an interest in the realty, so that the license has become non-revocable." *Western Union Tel. Co. v. Pennsylvania R. Co.,* 129 Fed. 849. "Where a dam has been built and pipes laid by a licensee, with consent of the licensor, for the diversion of water, the license is irrevocable, so long as the daming pipes remain for the purpose for which they were constructed." *Curtis v. Water Company,* 20 Ore. 34.

WHITFIELD, C. J., delivered the opinion of the court.

The case made by the facts is as follows: The Yazoo & Mississippi Valley Railroad Company has a line of railroad extending through the town of Belzoni, in Washington county, Miss., and early in the year 1900 S. Castleman applied to it for the construction of certain spur tracks to extend from its main line of railroad to the gin plant of the Belzoni Gin & Seed Company, in which he was largely interested, and to connect with the plant of the Belzoni Oil Company and a sawmill and other enterprises, all of which were then in contemplation, but not constructed. Accordingly, in May, 1900, said S. Castleman and said railroad company entered into a written contract for the construction of said spur tracks, wherein it was agreed, in effect, that said S. Castleman was to furnish the land and cross-ties needed therefor, and said railroad company was to furnish and lay the rails, and was to have exclusive possession and control thereof, and that said spur tracks were to be treated as personal property, and not a part of the real estate or land

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upon which they were placed, with the right in said railroad company to remove the same at any time on thirty days' notice. At the time this contract was made said Castleman had no interest in the land upon which said spur tracks were constructed, and never thereafter acquired any; but at that time said land was owned by the Belzoni Land Company, a corporation, which afterward conveyed the same by deed, together with other surrounding land, to the Belzoni Oil Company, another corporation, which afterwards constructed a mill plant thereon, contiguous to said spur tracks. Said Castleman is the president of said Belzoni Oil Company, and has been its president since its organization, some time in the year 1900, and was also president of said Belzoni Land Company at the time it conveyed said land to the Belzoni Oil Company, and was president of both companies at the time said contract for the spur track was made, as well as at the time of his negotiations with said railroad company leading up to said contract; but, notwithstanding the fact that the title to the land on which said spur tracks were constructed was shown by the public records to be in said Belzoni Land Company, and notwithstanding the corporate character of the various enterprises which said Castleman hoped to foster by the construction of said tracks, said railroad company entered into said contract for the construction thereof with said Castleman in his individual capacity, without any reference whatever to said Belzoni Oil Company or to any of the other corporate enterprises to be erected contiguous to said tracks.

In 1906 the Delta Southern Railway, another corporation, was engaged in the construction of a railroad through said county, passing through said town of Belzoni, and acquired by warranty deeds from the Belzoni Oil Company certain rights of way for its main line and certain spur tracks over the land of the Belzoni Oil Company, which crossed said spur tracks of the Yazoo & Mississippi Valley Railroad Company, and covered part of the ground occupied by them at or near the mill plant of said Belzoni Oil Company; and when the Delta Southern Railway began to construct a crossing over its road over

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said spur tracks of the Yazoo & Mississippi Valley Railroad Company, and to connect its spur tracks therewith at the point where its right of way coincided therewith, leading into the oil mill of the Belzoni Oil Company, the Yazoo & Mississippi Valley Railroad Company interfered and sought to prevent said crossing and connection. The Belzoni Oil Company's mill was so constructed as to make it impossible for the spur tracks of both of said railroad companies to enter the same without occupying the same space at and within the mill, and it was exceedingly desirable and beneficial to the Belzoni Oil Company to have the spur tracks of the Delta Southern Railway enter its mill, as otherwise the Yazoo & Mississippi Valley Railroad Company would enjoy a monopoly in the transportation of the produce of said mill therefrom and commodities thereto, greatly to the injury of said oil company; and when the Yazoo & Mississippi Valley Railroad Company objected to the Delta Southern Railway crossing and connecting with its spur tracks, said Castleman, having failed to induce it to consent to such crossing and connection, offered to take up its spur tracks and place the materials where it might designate, and to have the Belzoni Oil Company lay its own rails and permit it (the Yazoo & Mississippi Valley Railroad Company), to use the same free of charge, and notified it that it was a mere licensee in the use of said tracks, and that, if that offer was not acceptable, said spur tracks would be torn up and removed.

Thereupon the Yazoo & Mississippi Valley Railroad Company filed its bill in the chancery court of Washington county, based upon said contract with said Castleman, for the construction of said spur tracks, and obtained an injunction against said Castleman and the Delta Southern Railway restraining them from tearing up said tracks. A few days thereafter the Belzoni Oil Company, not being party to that suit, filed its bill in said court, alleging, in substance, that it was the owner of the land occupied by said spur tracks, that said Castleman had no interest in said land and no authority to make said contract for

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the construction of said tracks, and that the same, having been constructed without its consent or authority, became its property as a fixture, and thereupon obtained an injunction restraining the Yazoo & Mississippi Valley Railroad Company from interfering with the crossing of said spur tracks and connecting therewith by the Delta Southern Railway. To that bill of the Belzoni Oil Company the Yazoo & Mississippi Valley Railroad Company filled its answer, and afterwards said railroad company filed an amended and supplemental bill to the original bill, making said Belzoni Oil Company a party and praying for an injunction against said oil company and the original defendants, the Delta Southern Railway and said S. Castleman, restraining them from crossing said spur tracks, or making any connection therewith by the Delta Southern Railway, whereupon the chancellor, being unwilling to grant an injunction, in view of the different injunctions then pending, without notice and a hearing, cited the defendants thereto, said Belzoni Oil Company, the Delta Southern Railway and S. Castleman, to show cause on a given day why the injunction should not be granted as prayed for.

In the meantime the Belzoni Oil Company asked for and obtained leave of the chancellor to file an amended bill in its suit against the Yazoo & Mississippi Valley Railroad Company, praying for a mandatory injunction against said railroad company, restraining it from any further use or occupancy of its land by said spur tracks, and commanding said railroad to remove said tracks within a given time, to be named by the court. This amended bill of the Belzoni Oil Company differed from its original bill, in that in the original bill said oil company claimed to own said spur tracks as fixtures to its land, and sought to enjoin the railroad company from interfering with the oil company in effecting a crossing of its spur tracks and connection therewith by the Delta Southern Railway, whereas in the amended bill the oil company claims that said spur tracks were there under a mere license, which had been revoked, that

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said railroad company in its continuous use of said tracks was a continuous trespasser, and that its obstruction of the Delta Southern Railway in crossing and connecting with said spur tracks was a serious injury to the oil mill company in the conduct of its business and an unjustifiable interference with its control over its own property, and therefore it prayed for a mandatory injunction restraining the said railroad company from further use of said tracks and commanding it to remove the same from the oil company's land within a given time.

Said railroad company made a motion to dissolve the injunction granted on said oil company's original bill, and this motion, together with the application by the railroad company for an injunction on its amended and supplemental bill, and the application of the oil company for a mandatory injunction on its amended bill, were by consent of parties and of the chancellor heard in vacation, as one cause and at one time, upon all the papers in the several causes and upon affidavits that were taken by both sides; and said railroad company, in all of its pleadings in the several causes—that is to say, in its original bill, in its answer to said oil company's original bill, in its amended and supplemental bill, and in the affidavits filed in its behalf—founded its rights in the premises upon the aforesaid instrument with said Castleman for the construction of said spur tracks, and the fact that the oil company had the use of said tracks without objection or complaint, while the oil company showed it was the owner of the land occupied by said tracks, and never had any knowledge of said contract, or of its existence, and used said tracks with the idea that they were constructed under a mere license. So that at the hearing of said motion and said applications the chancellor was as fully advised of all the facts regarding the rights of the parties as he would likely be at the final hearing of said matters, and the result was that the chancellor rendered a single decree in said several causes sustaining the railroad company's motion to dis-

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solve the injunction granted upon the oil company's original bill, and refusing the railroad company's application for an injunction on its amended and supplemental bill, and granting the oil company's application for a mandatory injunction on its amended bill, restraining the railroad company from further using said spur tracks, and commanding it, within ten days from the date of the decree, to remove the same from said land. From that decree, in so far as it granted a mandatory injunction on the amended bill of the oil company, the Yazoo & Mississippi Valley Railroad Company asked for and obtained from the chancellor an appeal; and likewise from that decree, in so far as it dissolved the injunction granted on the oil company's original bill, the Belzoni Company asked for and obtained from the chancellor an appeal; and consequently both appeals and the facts underlying them are presented to the supreme court in one and the same record.

The instrument in this case is a license, and no more. It is in the following words and figures:

"This agreement, made and entered into this 22d day of May, A. D. 1900, by and between Stephen Castleman, of Belzoni, Mississippi, party of the first part, and the Yazoo & Mississippi Valley Railroad Company, party of the second part, witnesseth:

"Whereas, the party of the first part is engaged in business at Belzoni, in the state of Mississippi, and in order to facilitate the carrying on of the said business desires to have two spurs or side tracks constructed, connecting with the main track of the party of the second part at the said place, as shown by the red lines on the plan hereto attached, it is now mutually agreed as follows:

"(1) The party of the first part hereby agrees to furnish, free of charge to the party of the second part, all of the ground needed for the construction, use, and maintenance of the said spurs or side tracks, so far as the same shall extend beyond the right of way and grounds of the party of the second part, and to give the party of the second part secure and exclusive possession

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thereof, and to maintain the party of the second part in such possession so long as this agreement shall continue in force.

"(2) The party of the first part hereby agrees to do all of the grading and to furnish all of the cross-ties and switch ties needed for the construction of the said spur or side tracks, and to renew the same when required, and to keep and maintain said tracks in good and safe repair and condition, so long as the same shall be needed for his benefit or accommodation. All work done or material furnished by the party of the first part to be satisfactory in all respects to the chief engineer of the party of the second part.

"(3) Upon the completion of the grading to the satisfaction of the said chief engineer, and the delivery upon the ground of the ties of such size, shape, and kind as he shall require, the party of the second part hereby agrees to lay and construct the said track, and to furnish all of the rails, switches, frogs, spikes, and joints fastenings needed therefor.

"(4) The party of the first part hereby agrees to indemnify the party of the second part and to save it harmless from any liability for damage by fire, which, in the use of the said spurs or side tracks, or in the operation of the railroad of the party of the second part, or from cars or engines on its tracks, may be communicated to any building or structure belonging to or occupied by the party of the first part at Belzoni aforesaid, or to any goods, wares, merchandise, or other property which may be stored therein or on the premises adjacent thereto, to whatever cause the said fire may be attributable.

"(5) It is understood and agreed that the party of the second part shall be the owner of the said spurs or side tracks and of all material used in their construction, and shall have the right at any time in its discretion to abandon the use of said tracks and to take up and remove all of the material used in their construction from the premises occupied by the same, provided that a written notice of its intention to remove the said tracks shall be given to the party of the first part thirty days before the removal of the same is to be commenced.

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"(6) This agreement shall be binding on the heirs, executors, administrators, and assigns of the party of the first part, and on the successors and assigns of the party of the second part.

"In witness whereof, the parties hereto have caused these presents to be executed in duplicate the day and year first above written. Stephen Castleman.

"The Yazoo & Mississippi Valley Railroad Co.,
"By J. T. Harahan, Second Vice President."

This instrument conferred upon the Yazoo & Mississippi Valley Railroad Company a mere license. It is not a contract in any proper legal sense. It is simply a license, and nothing more. It is not a license coupled with any interest in the land. There are no words of grant in the instrument. The agreement on the part of Castleman was to "furnish" the land, material, etc. There cannot be worked out of this instrument any grant of an estate in or easement over in said land. At the time, too, that this instrument was executed, the title to the land was not in Castleman, but in the Belzoni Land Company, a corporation, which afterwards conveyed the land by deed to the Belzoni Oil Company, another corporation, which afterwards constructed this mill plant thereon. Whilst it is true that Castleman signed the instrument in his individual capacity, there are several important facts counter to the claim of the Belzoni Oil Company on this point to be carefully noted. First, the very machinery and material out of which this oil mill was built was transported over this spur track, built under this license executed in the year 1900. The Belzoni Oil Company began operation, and the business transactions between the oil mill company and the Yazoo & Mississippi Valley Railroad Company were entirely satisfactory until six years thereafter; all tracks being used as intended for the benefit of the said oil mill company. The president of the Belzoni Oil Company knew, and the company, under the facts in this case, must necessarily have known of this use of this spur track for this length of

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time, and have acquiesced in its use. It is further shown that this supply track, switches, etc., constituting the spur track, cost about $1,000, of which the railroad company paid something over $700, and the oil company something over $200.

We think the court did not err in granting the mandatory injunction restraining the Yazoo & Mississippi Valley Railroad Company from further use of the spur tracks and commanding it to remove them. The Yazoo & Mississippi Valley Railroad Company should have made inquiry as to the title to the land, and the slightest inquiry would have revealed the fact that the title was not in Castleman, but in the Belzoni Lumber Company. There are no words of grant in the instrument. It was revocable, and under the facts in this case it could be revoked without refunding any money spent by the Yazoo & Mississippi Valley Railroad Company. That line of cases which holds that, where one has entered under a license and expended large sums for improvements, etc., the other, the licensor, may not revoke the license without refunding the money so expended, this court has declined to follow. *Beck v. L., N. O. & T. R. Co.*, 65 Miss. 172, 3 South. 252. See, also, the valuable note of Mr. Freeman in *Lawrence v. Springer* (N. J. Eq.), 31 Am. St. Rep. 712. It is to be noted that many of the cases in which the licensor was held estopped, under circumstances of this sort, are from states in which part performance of a contract takes it out of the operation of the statute of frauds. That exception this court has distinctly refused to engraft upon the statute. In *Beck's case, supra,* Judge CAMPBELL, speaking for the court, expressly held that, though this doctrine might obtain elsewhere, it had no footing in our jurisprudence, and that a mere license, even for valuable consideration and where great expense had been incurred by the licensee, was revocable at the will of the licensor.

It is further held in 25 Cyc. 645, that it makes no difference whether the license is oral or in writing; and most manifestly it could not, since the nature of a license is not affected by the

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mode of establishing its existence, whether by oral proof, or whether by the production of an instrument of writing. Mr. Freeman, in the note referred to, fully considers both lines of authority, both those cases holding that the licensor may at his option, revoke the license without reimbursement to the licensee, and those holding the contrary doctrine, and says the former line of cases holding the better view, and cites the case of *Beck, supra,* as belonging to that class of cases. The best statement of the law on this subject which we find, and one which we quote with approval, is contained in *Crosdale v. Lanigan,* 129 N. Y. 604, 29 N. E. 824, 26 Am. St. Rep. 551, cited by Mr. Freeman in the note referred to. In that case the court said: "There has been much contrariety of decison in the courts of different states and jurisdictions. But the courts in this state have upheld with great steadiness the general rule that a parol license to do an act on the lands of the licensor, while it justifies anything done by the licensee before revocation, is nevertheless revocable at the option of the licensor; and this, although the intention was to confer a continuing right, and money had been expended by the licensee upon the faith of the license. This is plainly the rule of the statute. It is also, we believe, the rule required by public policy. It prevents the burdening of lands with restrictions founded upon oral agreements easily misunderstood. It gives security and certainty of titles, which are most important to be preserved against defects and qualifications not founded upon solemn instruments. The jurisdiction of courts to enforce oral agreements for the sale of land is clearly defined and well understood, and is indisputable; but to change what commenced in a license into an irrevocable right, on the ground of equitable estoppel, is another and quite different matter. It is far better, we think, that the law requiring interests in land to be evidenced by deed should be observed, than to leave it to the chancellor to construe an executed license as a grant, depending upon what, in his view, may be equity in the special case."

We do not think there is anything in the contention of the

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Belzoni Oil Company that it was not a party to this instrument. We think the conduct of the Belzoni Oil Company has been such as that this instrument is to be dealt with just as if it had been executed by said corporation. Manifestly it is estopped to say that it did not execute the instrument, after enjoying all the fruits the instrument was intended to secure. Treating the instrument as executed by the Belzoni Oil Company, it still remains in its nature nothing but a license, and on the facts in this case it is evident that the license had been revoked. We are therefore of the opinion that the action of the chancellor in granting the mandatory injunction was correct, and that decree is affirmed.

Coming, now, to the action of the chancellor in dissolving the injunction on the original bill of the Belzoni Oil Company, it is earnestly insisted by the learned counsel for the Yazoo & Mississippi Valley Railroad Company that the amended bill should not have been allowed to have been filed, on the ground that the amended bill stated an entirely new and different cause of action from that set out in the original bill; and it is further insisted that the chancellor erred in allowing the amendment to be filed, because, in determining whether the injunction granted on the original bill should be dissolved, the chancellor should have looked only to the original bill and not at all to the amended bill. Treating the last proposition first, it is to be noted that in the case of *Conover v. Ruckman,* 34 N. J. Eq. 293, it is held that an injunction bill may be amended even after the motion to dissolve, and that if, when so amended, it shows sufficient cause for continuing the injunction, it will be continued, and the motion to dissolve on the ground of defects in the original bill will be overruled, where these defects have been remedied by reason of the amendment, which does not change the cause of action; and this case is approved, as to the announcement of this principle, in *Alcorn v. Alcorn,* 76 Miss. 907, 25 South. 877, and again in High on Injunctions, § 1484, it is said that, "although an injunction may have been improvidently or ir-

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regularly allowed in the first instance, it will not be dissolved when it is apparent from the record that the plaintiff would be entitled to another injunction immediately upon the dissolution." We think this is a sound principle of chancery pleading, and that it was proper for the chancellor to look to the amended bill, as well as the original bill, in determining whether he would dissolve the injunction granted on the original bill. It is perfectly obvious that, though he might dissolve the injunction looking to the original bill, he was bound, under the allegations of the amended bill, to grant the injunction; and it is further obvious that the end sought to be obtained by both injunctions was practically the same. What sound reason can possibly be assigned for dissolving the injunction looking to the original bill alone, and immediately granting the same injunction, in effect, upon the filing of the amended bill? Especially is this principle applicable in a case like this, where all the bills for both parties were heard at the same time under an order of consolidation, and the equities, one way and another, dealt with as growing out of a common cause of action, to-wit, the instrument hereinbefore set out.

Recurring, now, to the first proposition, that the amended bill entirely changed the cause of action, we have to say that we think this contention, on the peculiar facts of this case, is not tenable. The principle that an amendment may not state a new and different cause of action is elementary. The trouble is in ascertaining whether it does that or not. The general principle is well stated in 16 Cyc. p 338, where it is said: "An amended bill must not be repugnant to the original one, nor may it present an entirely new and different case entirely changing the purpose of the suit. This principle is clear, but difficulties arise in determining what constitutes an essentially different case. A different case is not made by averments setting out a case more specifically or fully, or by adding new facts or grounds for relief consistent with those originally presented, although the relief demanded is thereby broadened, or

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even changed, the main general object of the bill remaining the same." Many authorities are cited, illustrative of the principle, in the notes. It is held in *Belton v. Apperson,* 26 Grat. (Va.) 207, that the frame and structure of the bill may be amended, so as to obtain an entirely different relief.

But the case which we think is exactly in point here is the case of *McDonnell v. Finch,* 131 Ala. 85, 31 South. 594, in which it was held that an amendment changing the conclusions of the pleader upon the facts stated or praying a different relief is proper. The facts in that case were, as to this point, briefly these: The creditors of one Louis Finch filed a bill against him, alleging that he had certain fraudulent dealings with the Evergreen Bank and its president, and that Finch, to secure the bank, had transferred and assigned to said bank, as collateral security, for his alleged indebtedness, a large amount of property, considerably more than sufficient to pay the indebtedness of Finch to the bank, and that this transfer was fraudulent in fact, and made with intent to hinder, delay, and defraud Finch's other creditors. That, now, was the case made, those the facts stated, and it was contended that, because the pleader alleged that certain attachments, sued out against Finch's estate by the Bank of Evergreen and levied on all his property and effects, had the effect (that the suing out of the attachments had the effect) of operating as a general assignment of all the property and effects of Finch, so as to make said property and effects inure to the equal benefit of the complainants and all the other creditors. That being the conclusion drawn by the pleader from the facts which he had stated, he then specifically prayed that the effect of the suing out of said attachments be declared to operate as a general assignment of all the property and effects of Finch, so as to make them inure to the equal benefit of all creditors; but, in addition to this specifically prayed relief, the complainant also prayed for general relief. Afterwards an amended bill was filed by the complainants, in which they asked that that portion of the original bill alleging

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that the suing out of said attachments operated as a general assignment should be stricken out, and that in lieu thereof there should be inserted an allegation that the suing out and levying of said attachments was done for the purpose of hindering, delaying, and defrauding complainants, and that said attachments were fraudulent and void as to complainants. Complainants further prayed that their special prayer be stricken out, and then prayed that said attachments be declared fraudulent, null, and void as to complainants. The respondents objected to the allowance of this amendment upon the ground that it made an entirely new and different cause of action, and on that point the court said that:

"Leaving out of view all conclusions of the pleader, and confining our consideration to the facts alleged in the bill, a clear case is made to have the writs of attachments declared fraudulent. *First Nat. Bank v. Acme White Lead & Color Co.*, 123 Ala. 344, 26 South. 354, and cases cited. Indeed, it is the only relief that could be granted upon proof of the facts averred. Clearly no case is made by it to have the attachments declared a general assignment. As a bill for that purpose, with the conclusions of the pleader in or out of it, and the special prayer in or eliminated, it would be without equity. *Supply Co. v. Lucas,* 119 Ala. 202, 24 South. 416. If, upon the facts alleged, the bill is without equity, the conclusions of the pleader predicated upon those facts, whether in the charging part of the bill or in the special prayer, or in both, cannot import equity into it. And the converse of the proposition is equally true. If, upon the facts alleged, the bill has equity, conclusions of the pleader and the special prayer will not destroy that equity. The real character of a suit in equity is to be determined from a consideration of the matters of substance embodied in the pleadings. *Ex parte Smith,* 34 Ala. 455; *Sayre v. Land Co.,* 73 Ala. 86. In cases of the character of the one under consideration, the facts upon which the relief sought depends, and not the conclusion of the pleader, consti-

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tute the substance of the bill, and must control in determining its equity. The bill under consideration is strikingly similar in averments and special prayer to the one passed upon by this court in *Steiner v. Parker,* 108 Ala. 357, 19 South. 386, in which the general averments or conclusions and the special prayer were disregarded, and effect was given to the facts alleged in conjunction with the general prayer for relief. And the decision in that case is conclusive of the question raised in this. It has never been supposed that a special prayer could be made the basis for relief inconsistent with the facts stated in a bill, or could impair its equity. Under it, the court could only grant such relief as the case stated will justify. If no case is made, no relief could be granted; and, if a case is stated which is inconsistent with the special prayer, relief may be granted under the general prayer, but not under the special prayer. *Bailey v. Burton,* 8 Wend. (N. Y.) 399. For 'a complainant can have no greater relief than the facts alleged in his bill warrant.' *First Nat. Bank v. Acme White Lead & Color Co., supra; May v. Lewis,* 22 Ala. 646; *Betts v. Gunn,* 31 Ala. 219; *Munford v. Pearce,* 70 Ala. 452; *Rice v. Eiseman,* 122 Ala. 343, 25 South. 214. The learned chancellor, in refusing to allow the amendments proposed by the complainant, proceeded upon the theory that the purpose of the bill was that of declaring the attachment proceedings a general assignment, and that, therefore, the amendments offered were a departure—a conclusion reached by him, doubtless, upon consideration of the general averments and special prayer, ignoring the facts alleged and the general prayer. Perhaps it was upon this theory that he dismissed the bill for want of equity."

We approve the principles announced in this case as sound, and they exactly fit the point under discussion in the case at bar. Both bills, the origial and the amended, in this case, sought to accomplish the same end, upon virtually the same facts, and merely assigned different reasons for accomplishing the end sought. The foundation fact, the fact which controls

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the whole case, is the instrument creating the license above set out. That instrument is substantially the basis for both the original and amended bills. The facts stated, as facts, are practically the same in both bills. Wherein, then, does the difference consist? Merely in the conclusions which the pleader drew as to what his relief should be in the original and in the amended bill. The complainant alleged in the original bill that the ties, etc., were its property as fixtures. That was not the allegation of a fact; but it was the statement of a conclusion the pleader drew from the facts as to what remedy he was entitled to. So, also, when, in the original bill, the complainants prayed for the specific relief, as if the ties, etc., had been the property of the complainant, that prayer for specific relief was no statement of any fact. It was simply the pleader's idea as to the relief that should be granted. The foundation fact, the instrument, was the same in both bills. The other facts were practically the same in both bills, and the only difference between the two—very great difference it is true, of its kind—was that the pleader in the one bill drew different conclusions and prayed different relief from the conclusions and relief he drew and prayed in the other. But the court or chancellor is not to grant relief on the pleader's conclusions, or to frame the relief by a specific prayer inappropriate to the facts on which the bill is bottomed. It is the duty of the court to look, not to what the pleader may have to say in stating his conclusions, or in framing his specific prayer, but to see what the facts—the very facts—are, and, if there be a prayer for general relief, to grant the relief the law allows, irrespective of the erroneous conclusions or mistaken prayer the pleader may incumber the bill with. What was the object of both these bills for injunction? Why, manifestly, to enable the Delta Southern Railway to run its track into the oil mill yards of the oil mill company. That was the thing sought to be obtained. The reasons of the pleader as to why it ought to be granted might be entirely erroneous; but that error would not prevent the court,

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Syllabus.

on a prayer for general relief, from granting such relief as the facts disclosed would be allowed. As said in the quotation from Cyc., *supra,* there was no change of the purpose of the bill, and "the main general objects of the bills" were the same.

We are therefore clearly of the opinion that the amendment was properly allowed, since it did not entirely change the purpose of the bill, and did not state in any legal proper sense a new and distinct cause of action. Since, therefore, the amendment was properly allowed, and since it was proper for the chancellor to look at both the original and amended bill in determining whether he would dissolve the injunction issued on the original bill, and since, also, if he had so dissolved it, as he did, he would have been compelled on the facts of this case and the pleadings to grant practically the same injunction on the amended bill, it was clearly erroneous for the court below to dissolve the injunction on the original bill.

Wherefore that decree is reversed, and the cause remanded, to be proceeded with in accordance with this opinion as to the action of the court in both causes.

Reversed.

WILLIE JACKSON v. STATE OF MISSISSIPPI.

[47 South. 502.]

1. CRIMINAL LAW AND PROCEDURE. *Murder. Evidence. Dying declaration. Sense of impending dissolution.*

The declarations of a dying man are sufficiently shown to have been made under a sense of impending dissolution to make them admissible in evidence, if otherwise competent, where it was shown that the deceased had been informed by his attending physician that there was no hope for his recovery and that he announced, when he made the declarations, that he was going to die, that he could not live and that his stomach was killing him.

2. SAME. *Same. Killed for nothing.*

A dying declaration is admissible in evidence, where otherwise competent, although it be merely the statement by the declarant that accused killed him for nothing.

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Statement of the case.

3. SAME. *Prosecuting lawyer. Improper argument. Harmless error.*

A statement by the prosecuting lawyer, in argument to the jury, to the effect that more murders had been committed in the county than elsewhere in the state, and that it was high time for the juries to put a stop to them, does not constitute reversible error where upon objection the court advised the jury that it was improper and should be disregarded.

FROM the circuit court of Yazoo county.

HON. WILEY H. POTTER, Judge.

Jackson, appellant, was indicted for the murder of one Bunk Wilson, was tried, convicted of manslaughter, sentenced to the penitentiary for three years, and appealed to the supreme court.

Appellant, deceased, and several other negroes were at the home of a negro woman, and as a result of certain remarks passing between appellant and deceased a difficulty arose between them in which appellant stabbed deceased with a knife. Before his death the deceased made statements to different persons, as set forth in the opinion, and after being told by a physician that he was bound to die in a very short while and had better say anything he desired to say, the dying man stated: "I didn't do nothing to Willis Jackson to make him cut me that way. I only told him that I did not joke."

In the supreme court the appellant assigned as error the admission of the dying declaration in evidence, on the ground that a predicate had not been properly laid in that deceased was not sufficiently shown to have been at the time in apprehension of immediate death. The remarks made to the jury by the prosecuting lawyer in his speech were also assigned as error; the lawyer said: "Gentlemen, your county is running red with human blood from the northern boundary at Free Run to the southern boundary where she bathes her feet in the muddy waters of the Big Black, and from the banks of the Sunflower to the Illinois Central Railroad at the town of Vaughns. There have been more murders committed in your county than in any other county in the state, and there are more being committed now in this county than ever before in its history, there being fourteen

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murder cases pending for trial in this county. It is high time that the juries of the county shall put a stop to these murders." When the foregoing language was used, counsel for the defense immediately interposed an objection thereto as being improper, and the objection was at once sustained by the court, the jury being advised by the court to pay no attention to the remarks touching other murders or cases but to try the case solely upon the evidence. The court further, in the jury's presence, reprimanded the prosecuting attorney for his language, whereupon the attorney stated that when interrupted he was about to tell the jury, that they should not try the defendant by any other evidence than that adduced at the trial and if they did not believe from the evidence that defendant was guilty beyond reasonable doubt they should acquit him.

Holmes & Holmes, for appellant.

The court below erred in admitting the testimony of the three different witnesses in reference to the dying declaration of deceased. The predicate of such declaration was based upon the following preceding remarks of the declarant, made to each of the three witnesses respectively: (1) "I am going to die. I cannot live. My stomach is killing me." (2) "Austin, I am dying. I cannot live." (3) "Uncle Will, my stomach is killing me." The principle is too well known for comment that the declarant must not only feel the absolute certainty of death, but his expectation must be of a speedy death. An expectation of ultimate, yet distant, death does not produce that sincerity of statement which the law desires. The impression of immediate dissolution must exist in the declarant's mind before his statements will be admissible after his death. The mere fact that the deceased shortly before his death stated that he could not live, and that he was going to die, will not show that he believed that he was then *in extremis* and that death was not only inevitable but impending and immediate. *Titus v. State* (Ala.), 23 South. 77. The expressions, "my stomach is killing me" and "I cannot live"

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Brief for appellant.

are expressions of great pain, of physical suffering, but not direct expressions tending to show that the declarant expected his death to be imminent. *Justice v. State* (Ala.), 13 South. 658.

It is a well-established rule that in the admission of dying declarations the primary facts which lay the predicate for the admission of such declaration are to be closely and carefully scrutinized and considered, and unless they are clearly satisfactory to the judicial mind they should be rejected.

In this case, where the issue was so close, the most careful and deliberate judgment of the jury was required, and anything constituting an infringement upon any of his rights was most prejudicial to appellant. Hence, the language used by the assistant prosecuting attorney in his argument of the case before the jury gives ground for reversal of the judgment of the court below. By his argument the jury were without doubt inflamed in their minds and prejudiced against appellant. There must be some restraint upon the arguments of counsel for the prosecution in criminal cases. Certainly in this case the assistant prosecuting attorney had no legal right to talk before the jury about "other murders." To go outside of the record, as was done, and to state to the jury that there had been about fourteen murders committed in the very county from whence the jury were drawn, and to urge the jury to put a stop to these murders, must be held to be an infringement upon appellant's constitutional rights, he being on trial for a capital offense.

George Butler, assistant attorney-general, for appellee.

The objection by appellant that there should be a reversal because of the admission of the dying declaration of the deceased is without merit. It was clearly proved on the trial below that the declarant knew he was about to die and that death was impending. He had been informed by a reputable physician, in whom he had confidence, that his death was imminent, that he could not possibly live. Hence his declaration was properly allowed

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to go before the jury. *Lipscomb v. State,* 75 Miss. 559, 23 South. 210, 230.

As regards the contention of appellant that the remarks of the assistant prosecuting attorney, made before the jury in his argument of the case, were improper, it is merely necessary to call this court's attention to the fact that the court gave timely instruction to the jury that they should not regard these remarks and also admonished the attorney while before the jury that such remarks were inappropriate. It is hardly probable that the jury, men of intelligence and prudence, would be swept away from a calm contemplation of the case by these remarks, even if the court had not immediately taken the prudent steps it did.

CALHOON, J., delivered the opinion of the court.

The predicate of the dying declarations of the deceased Williams, in this case, testified to by two or three witnesses, collated, was as follows: He stated, "I am going to die. I cannot live. My stomach is killing me." This was at twelve o'clock at night, and Williams died the next day, before noon. Another witness testified that the deceased said: "Austin, I am dying. I cannot live." Another that he said: "Uncle Will, my stomach is killing me." The attending physician testified, quoting the words of the witness: "I told him he had only a few minutes to live. He asked me if I could do him any good at all, and I told him, 'No;' that he would die in a few minutes." We think the predicate showed a condition of mind in reference to dissolution that made the statement of facts admissible in evidence. It was then ruled by the court that the dying declaration could be admitted, and it was put in evidence before the jury, containing the statement of the facts of the occurrence, and this ruling of the court we think was right. In William's statement to the doctor there was no detail of the facts, but he did say that the accused "killed him for nothing." The credibility of the witnesses who testified to the declarations was for the jury.

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Statement of the case.

We find no reversible error in the case. The language of the assistant counsel for the prosecution to the jury, while in practice wrong, does not constitute reversible error; the objection having been sustained by the court, and the jury properly warned to pay no attention to it, but to try the case solely upon the evidence before them.

The judgment is affirmed.

STANTON BORROUM v. STATE OF MISSISSIPPI.

[47 South. 480.]

1. CRIMINAL LAW AND PROCEDURE. *Sale of intoxicants. Objections to testimony. Motion for new trial. Supreme court practice.*

Exceptions to rulings on testimony not called to the attention of the trial court in a motion for a new trial will not be cause for reversal by the supreme court.

2. SAME. *Same. General law. Special act.*

A conviction for the unlawful sale of intoxicating liquors can be had under a general law, although the offense was committed in a part of the county subject to a previous local law prohibiting such sales and the penalties prescribed in the two statutes are different.

FROM the circuit court of Lafayette county.

HON. WILLIAM A. ROANE, Judge.

Borroum, the appellant, was indicted and tried for unlawfully selling intoxicating liquors, was convicted and sentenced to imprisonment and payment of a fine, and appealed to the supreme court.

By legislative enactment the sale of intoxicating liquors is prohibited within five miles of the state university, located at Oxford, in Lafayette county. The indictment of appellant was however drawn without regard to this special statute, and merely

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Brief for appellee.

set forth, in addition to the formally requisite parts thereof, that "Stanton Borroum, late of the county aforesaid, on the 3d day of March, 1906, in said county unlawfully did sell vinous, spirituous and intoxicating liquors in less quantities than one gallon, without first having obtained a license so to do as required by law." It will be noted that the indictment was in form predicated of the general local option law, applicable in Lafayette county.

On appeal the appellant assigned as error that the minutes of the court below failed to show that any order was taken at certain terms of the court between the time the indictment was found and the conviction had. It was also assigned for error that the court below erred in the improper admission and exclusion of certain testimony.

W. V. Sullivan and *C. E. Slough,* for appellant.

The indictment does not show whether or not the alleged sale of intoxicating liquor was within five miles of the state university. The judgment of the court below should accordingly be reversed, and the case be remanded for a new trial.

The court below erred in excluding testimony offered in behalf of appellant, and also erred in admitting testimony for the state, as set out in the appellant's assignment of errors.

It does not appear that any order was taken in the case at the September, 1906, term, or the March and September, 1907, terms of the circuit court. The judgment should accordingly be reversed with instructions to the court below to dismiss the case. *Gaiter v. State,* 45 Miss. 441.

George Butler, assistant attorney-general, for appellee.

Merely because the sale of intoxicating liquors is, by the statute law, prohibited within five miles of the state university does not prevent a conviction under the general local option law applicable to the county wherein the state university is situated.

This court will not consider whether the court below erred

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Opinion of the court.

in the admission and exclusion of testimony, since the motion for a new trial as filed in that court does not specify its rulings thereon. The fact that the appellant's assignment of error mentions such alleged errors of the court below will not help appellant under the circumstances. *Richberger v. State,* 90 Miss. 806, 44 South. 772.

CALHOON, J., delivered the opinion of the court.

On the objection that the indictment does not show that the sale of the liquor was not within five miles of the state university, we have to say that the instrument was good for any sale in the county, and was pleaded to accordingly. If, under the indictment, it was necessary to show by evidence that the place of the sale was not within the five-mile limit, which we do not decide, we think it was shown by the witness Wiley Johnson, who testified for the defendant, that his residence was twelve miles northeast of Oxford, and that the residence of Parks, where the sale was made, was four or five miles further away.

We cannot consider the objections to the admission and exclusion of testimony, because, as the motion for new trial does not specify them, under the *Richburger case,* 90 Miss. 806, 44 South. 772, we cannot properly reverse. The jury manifestly believed the testimony for the state. It is to be noted in reference to the other matters adduced in the assignment of errors, that they are covered by Code 1906, § 4936, prohibiting reversals on technical grounds therein stated. We find no error in the charges.

Affirmed.

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Brief for appellant.

EUGENE JOHNSON v. STATE OF MISSISSIPPI.

[47 South. 897.]

CRIMINAL LAW AND PROCEDURE. *Witnesses. Husband and wife. Failure of husband to call wife. Argument.*

The failure of the husband to call his wife as a witness for him in a criminal case is not a proper subject of comment by counsel.

FROM the circuit court of, first district, Yalobusha county.

HON. SAMUEL C. COOK, Judge.

Johnson, appellant, a negro, was indicted and tried for an assault and battery with intent to murder one Green, was convicted, sentenced to the penitentiary for seven years, and appealed to the supreme court.

The opinion of the court sufficiently states the facts.

Creekmore & Stone, for appellant.

The record shows that the district attorney in the court below was allowed, over the objection and protest of appellant, to state and to reiterate both in his opening and closing arguments to the jury, that the appellant had not placed his wife upon the witness' stand in his behalf; and this without one word of correction from the court. The action of the district attorney was too plainly in violation of the statute to need citation of authority. The appellant's wife had separated from him and begun to live with Green some short while before the time of the appellant's assault upon Green, for which appellant was indicted. She had been continuously since then hostile to appellant, had never lived with him since the assault, and was summoned as a state's witness at the trial, her name being upon the back of the indictment, together with the names of the other state's witnesses. At the trial she was in the witnesses' room adjacent to the court room where the trial was conducted, and

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was evidently ready and anxious to testify against appellant, irrespective of the truth. It was reasonable for appellant to presume, under the circumstances, that she would hardly testify truthfully in his favor, as she wanted to get rid of him because of her strong infatuation for Green, the negro assaulted by appellant.

The learned district attorney went in argument far beyond his province. *Cole v. State,* 75 Miss. 144, 21 South. 706; *Byrd v. State,* 57 Miss. 243; *Johnson v. State,* 63 Miss. 313; *Scott v. State,* 80 Miss. 197, 31 South. 710. See also *Graves v. United States,* 150 U. S. 118, 37 L. Ed. 1921.

George Butler, assistant attorney-general, for appellee.

Under the decisions of *Cole v. State,* 75 Miss. 142, 21 South. 706, and *Johnson v. State,* 63 Miss. 313, the remarks of the learned district attorney to the jury in the court below constituted error. Whether the appellant's own testimony does not conclusively show his guilt of the charge is respectfully referred to this court.

FLETCHER, J., delivered the opinion of the court.

This was a prosecution for assault and battery with intent to kill and murder. The evidence was conflicting as to which party fired the first shot, and, indeed, as to who was the aggressor in the difficulty.

The special bill of exceptions contains the following statement: "In the concluding argument by the district attorney, he said: 'Gentlemen of the jury, there is another witness to this difficulty. Where is she? Where is the wife he says he loved so dearly? Where is the wife he called his baby? If the defendant had wanted a fair hearing of this case, if he had been willing that the circumstances of the fight be fairly investigated, why did he not put her on the stand? The state could not have her sworn and put on the stand, and the defendant could have done so. Where is she?' And the district attorney then pointed to

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the witness room. To the use of all of said language to the jury the defendant then and there objected, and moved the court to instruct the jury orally to disregard them, which objections and motions were overruled by the court, to which action of the court the defendant then and there excepted."

There is a much stronger case for reversal than was *Cole v. State*, 75 Miss. 142, 21 South. 706, in which case this court held flatly that the district attorney should not comment upon the failure of the wife to testify; for in that case it does not appear, as here, that timely objection was made, and that the district attorney proceeded in his improper argument with the full knowledge of the court.

Reversed and remanded.

GRENADA COTTON COMPRESS COMPANY v. WILLIAM ATKINSON.

[47 South. 644.]

1. EVIDENCE. *Books showing business transactions.*

An entry made in a book used for that purpose by one person in the regular course of business, recording an oral or written report made to him by another in the regular course of business, of a transaction lying in the personal knowledge of the latter, is admissible in evidence, where the practical inconvenience of producing on the stand the numerous persons concerned would, in the particular case, outweigh the probable utility of so doing.

2. WAREHOUSEMEN. *Injury to goods. Limitation of liability. Adjustment before removal of property. Waiver of provision.*

Where the dealings between warehousemen and the owners of cotton stored with them showed that the parties had disregarded a provision in the warehouse receipts that all claims for damages against the warehousemen should be adjudicated before the cotton was removed, the provision could not be set up as a defense by the warehousemen in an action for damages brought after the removal of the cotton.

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Statement of the case.

3. SAME. *Receipts. Construction. Fire and water exception.*

A clause in a warehouse receipt exempting the warehousemen from liability for loss by fire and water did not cover damage from exposure to the ordinary action of the elements, but related to damages from some disaster produced by fire or flood in the nature of an overwhelming catastrophe.

4. SAME. *Damage to goods. Action for. Evidence.*

In an action for damages to certain lots of cotton, described in a bill of particulars, while stored in defendant's warehouse, each bale of which was evidenced by a separate compress receipt, testimony showing the damage to all the cotton, and identifying the damaged bales as the identical cotton delivered to defendant and described in the bill of particulars, and that the damage resulted through defendant's negligent handling of the same, was sufficient, and it was not necessary to prove the particular damage to each separate bale.

FROM the circuit court of Madison county.

HON. WILEY H. POTTER, Judge.

Atkinson, appellant, was plaintiff in the court below, the Cotton Compress Company, appellant, was defendant there. From a judgment in plaintiff's favor the defendant appealed to the supreme court.

The appellant did a cotton warehouse business in Canton, Miss., and for each bale of cotton delivered to it for storage issued a separate receipt in the following form, with the blanks properly filled out:

"Granada Cotton Compress Company.

"Canton, Miss.,——, 1905. No. 34,108.

"Received of —— one bale of cotton in apparent good order.

Mark.	No.	Weight.	Remarks.
——	——	——	——

"All claims of any kind hereunder must be adjudicated before the property leaves our possession. Not responsible for loss or damage by fire or water. This bale of cotton to be delivered only on return of this receipt properly indorsed.

"————, Manager."

The appellee was a cotton merchant in New Orleans, La., and

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Statement of the case.

did business in Canton, Miss., where he had an agent, one Dow, and appellee through Dow bought large quantities of cotton from different owners having cotton stored with the appellant, who delivered to Dow the warehouse receipts representing the cotton and these deliveries were in fact considered as the delivery of the cotton, since the appellant recognized the holders of the receipts as the owners of the cotton covered by same and bearing the corresponding numbers and marks. The cotton of the appellee was shown to have been in good condition when delivered to the compress company. A large quantity of the cotton so delivered to appellant was by it placed on the ground in an open field, without protection from the rain or from water standing on the premises. The season was a wet one, and afterwards, when this cotton was shipped to appellee in New Orleans, at the request of Dow, it was found to have been damaged by water.

Upon the receipt of the cotton in New Orleans, it was delivered to a public weigher, one Crawford, who weighed and inspected the cotton, and kept books in which he entered the grade mark, weight and condition of each bale of cotton. If the cotton slightly damaged, it was "scale picked;" that is, the damaged cotton was picked off at the scales under his supervision, so as to put the bale in merchantable condition. The bale was then reweighed, and a record made of the loss in weight. When the bale was found to be so badly damaged that it could not be put into merchantable condition by "scale picking," Crawford ordered it sent to a cotton pickery; each bale sent to the pickery being accompanied by the grade mark and weight of the bale, and a memorandum given to the driver of the dray from the pickery, which was handed to the foreman of the pickery, one Steeg. Upon receipt of the cotton at the pickery, Steeg entered in books kept by him the tag number, original weight, and grade mark. The bale was then picked under his supervision, so as to put it in merchantable condition. He then reweighed the bale and entered the reweight in his books. The pickings was then paid for by the pickery at the regular market price. The

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Brief for appellant.

cotton was then sold by appellee according to these reweights at the regular market price. The sum sued for in this case was the value of cotton lost on each particular lot of cotton at the prevalent market price, giving credit for the value of the pickings.

On the trial the court admitted the books of each witness to be used in connection with the testimony of Crawford, the cotton weigher, Steeg, the pickery foreman, Dow, appellee's agent at Canton, L. S. Atkinson, the general manager for appellee, and the books of the appellant compress company, produced and identified by its agent at Canton, Hester. All of the books introduced as evidence, from which the above witnesses testified, were objected to by the defendant below on the ground that they had not been legally authenticated, since it appeared that the witnesses did not make all of the entries in the books from which they testified, and did not have personal knowledge of the matters about which their testimony was given, but relied upon the books for facts. Appellee offered proof showing that the books were correctly kept, were frequently audited and balanced during the course of business, that all entries made in them were made at the time the various transactions occurred, and were made by the parties having knowledge of such transactions.

Other questions were presented: First, as to the right of the appellee to recover, because the claim was first made after the cotton had left the compress, in violation of the terms of the receipt; second, because the compress company did not assume liability for damages by water according to the terms of the receipt; and third, because damage to each particular bale was not proved, it being shown only that certain lots of cotton were damaged.

W. C. McLean, for appellant.

Under the principles laid down in *Chicago, etc. R. Co. v. Provine*, 61 Miss. 288, and reaffirmed in *Illinois, etc., R. Co. v. Gross*, 22 South. 946, the plaintiff signally failed to make out his case. The evidence shows that only one bale at a time was

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Brief for appellant.

delivered, and that for each separate bale a separate and distinct compress company's receipt ticket was issued; and there is nothing to show the loss on any one particular bale. It is a clear proposition that the delivery of each bale of cotton to the compress company was a separate and independent contract; and accordingly it must follow, as held in the *Provine case, supra,* that before plaintiff can legally recover he must show the breach of that specific contract. The only way whereby the breach of any particular contract can be shown is by identification of the particular bale of cotton with reference to which the breach occurred; and the amount and character of damage to such bale must be clearly shown. As plaintiff has recovered on claim of damage to a large number of bales viewed in the aggregate, and has failed to show the extent of damage to each different bale, the judgment of the court below should be reversed and the cause be remanded.

W. H. Powell, Huber & Powell, on the same side.

But for the different books of account shown in evidence, and from which different witnesses for appellee testified, appellee's case must fall to the ground. It will be noted that none of the witnesses had any recollection, independent of the books, of the matters about which they testified tending to establish the identity of the cotton, its value, quality, or damage and time of damage thereto. The books were not properly authenticated and all of the witnesses did not make the entries in the books from which they testified. Their testimony was accordingly incompetent. *Chicago, etc. R. Co. v. Provine,* 61 Miss. 288; *Moody v. Roberts,* 41 Miss. 77.

In order to sustain a judgment in his favor the appellee should have proved every identical bale damaged and the amount of damage to each bale after the compress company received the cotton and before it lost possession of it. A claim for general shortage or damage to a whole consignment of cotton consisting of many bales is not recoverable. *Chicago, etc. R. Co. v. Provine, supra.*

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Brief for appellee.

The appellee is precluded from recovery because of the provisions in the compress company's receipts that all claims for damages must be adjudicated before the cotton leaves the compress company's possession. Such a provision is reasonable. *Hunnicutt v. Express Co.*, 54 Miss. 566; *Libbey's case*, 33 L. Ed. (U. S.) 818.

A public corporation cannot by previous contract exempt itself from its own negligence, but a private corporation, such as is appellant, may do so. Therefore the provision in the contract of bailment that appellant should not be responsible for damages from fire and water can be invoked in its defense. The damages to the cotton, if any, were caused by water; and, even if appellant caused the damage, it cannot be held liable because of the exemption as to this under the contract.

Pratt & Reid, for appellee.

The books of account of the weigher and picker were properly admitted in evidence. If we take as our guide the rule laid down in *Moody v. Roberts*, 41 Miss. 74, to the effect that it must appear that the books "are the regular books of account of the party, containing the original entries of his transactions from day to day in the regular course of his business and made at or about the time of the transactions noted and sought to be proved, and that they are fairly and honestly kept," then it must follow that the court below did not err in admitting the books in evidence. The books were shown in evidence to be of original entry. The method of verifying the books was clearly and competently shown. The original bills of lading of the railroad company in evidence tallied with the entries in so far as they went. No question of the corectness of the books was ever raised. The book-keeper who kept appellee's books, that is to say, who actually indited the entries in ink in the books, was beyond the jurisdiction of this state, being a resident of Louisiana, and could not be gotten as a witness; but appellee testified that he habitually made examination of the books from time to time, and himself knew they were correctly kept. Appellee's agent,

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Brief for appellee.

Dow, at Canton, proved the authenticity of the books kept in Canton and shown in evidence. Under the *Provine case* cited by opposing counsel, the books were completely authenticated. See also *Murray v. Pepper,* 42 South. 1031, 17 Cyc. 386; Wigmore on Evidence, § 1530; *Louisville, etc., R. Co. v. Daniel,* 91 S. W. 691; *Insurance Co. Railway Co.* (N. C.), 50 S. E. 452; *Hichner v. Railway Co.,* 158 Fed. 1011; *Corkran v. Rutter* (N. J.), 69 Atl. 954.

The impossibility of any person remembering from independent recollection the details of all the transactions noted in the books is apparent. The bookkeeper who wrote the entries in the books of account had no knowledge of the facts transcribed. The messengers who brought the manifests and bills of ladings from the railroad company to appellee's agents, knew nothing of the facts written therein. A rule of law such as appellant seeks here to invoke would make it absolutely impossible for any one conducting a business of any magnitude to prove up his books to meet the technical demands of the opposing party. It would have been idle for appellee to have brought his bookkeepers from Louisiana, inasmuch as, even if they were present at the trial, they could have had no knowledge of the transactions represented by the items in the books kept by them. Under the circumstances this court will not reverse because of the admission of the books in evidence. *Continental National Bank v. First National Bank,* 108 Tenn. 374, 68 S. W. 497; *Lumber Co. v. Johnson,* 98 S. W. 207; *Dam, etc. Co. v. Allen,* 66 Atl. 537.

Even conceding for the sake of discussion that the compress tickets issued by appellant for every bale of cotton constituted separate contracts binding upon the bailor, the provisions, "all claims of any kind hereunder must be adjudicated before the property leaves our possession" and "not responsible for loss or damage by fire or water," can avail the appellant nothing in this case. Each of these quoted stipulations is an attempt by appellant to contract against its own negligence. 28 Am. & Eng.

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Ency. of Law (2d ed.) 636. But appellant cannot set up such defense in this case, because the evidence shows that the past course of dealings of appellant negatives the idea that such provisions should be relied on for defense in case of damage to bales of cotton in its possession.

FLETCHER, J., delivered the opinion of the court.

One of the numerous questions presented by this record is the competency of the books introduced in evidence. It is earnestly argued that these books are not shown to be competent within the principles of *Chicago, etc. R. Co. v. Provine,* 61 Miss. 288, and other familiar authorities. Considering the showing made as to the manner in which the books were kept, the sources of information relied on by the persons who made the entries, the due and regular course of business to which the entries relate, the methods by which the entries were verified, and the proof as to their correctness as shown by subsequent developments, we think it is not necessary to qualify in any respect the rule laid down in the *Provine case,* in order to hold the books competent in this particular case.

We give our approval to the admirable statement of the modern rule contained in Wigmore on Evidence, § 1530. It is there said: "The conclusion is, then, that where an entry is made by one person in the regular course of business, recording an oral or written report, made to him by one or more other persons in the regular course of business, of a transaction lying in the personal knowledge of the latter, there is no objection to receiving that entry under the present exception, provided the practical inconvenience of producing on the stand the numerous persons thus concerned would in the particular case outweigh the probable utility of doing so. Why should not this conclusion be accepted by the courts? Such entries are dealt with in that way in the most important undertakings of mercantile and industrial life. They are the ultimate basis of calculation, investment, and general confidence in every business enterprise;

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nor does the practical impossibility of obtaining constantly and permanently the verification of every employe affect the trust that is given to such books. It would seem that expedients which the entire commercial world recognize as safe should be sanctioned, and not discredited, by courts of justice. When it is a mere question of whether provisional confidence can be placed in a certain class of statements, there cannot profitably and sensibly be one rule for the business world and another for the courtroom. The merchant and the manufacturer must not be turned away remediless because methods in which the entire community places a just confidence are a little difficult to reconcile with technical judicial scruples on the part of the same persons who, as attorneys, have already employed and relied upon the same methods. In short, courts must here cease to be pedantic and endeavor to be practical." Considering this exact statement of the rule as supplementing what has been said by this court on the subject, we have no difficulty in approving the action of the court below in admitting the books in evidence.

Due consideration has been given to the contention on the part of appellant that the plaintiff is precluded from recovering in this action on account of the provisions in the compress receipts that all claims for damages must be adjudicated before the cotton leaves the possession of the compress company. Such a provision, while manifestly reasonable and enforceable in some cases, cannot be upheld on the facts of this case. It is clear that the course of dealing between the parties negatives the idea that this clause can be set up as a defense. In the absence of opportunity to make a careful examination, considering the fact that the cotton could not be withheld from the market for an indefinite period while the slow process of adjudication was being completed and the further fact that the compress company itself, as shown by the declaration of its manager, attached little or no importance to the provision, we are constrained to uphold the rullings of the circuit court on this point.

We deem it unnecessary to decide whether a compress com-

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pany, receiving and storing cotton for safe-keeping, compression, and shipment, can contract against the consequences of its own negligence. Upon the point made as to the clause in the compress receipt exempting the company from liability for loss by fire and water, we think that this has no reference to damage resulting from exposure to the ordinary action of the elements. The exemption from liability relates to damage resulting from some disaster produced by fire or flood, in the nature of an overwhelming catastrophe. It was, manifestly, not within the contemplation of the parties that the bailee should, by virtue of this clause, be licensed to expose the cotton to the weather and thus produce the damage which ordinary care should have avoided.

It is said that the action must fail because each bale of cotton stored with the company is evidenced by a separate compress receipt, and that it therefore became the duty of the plaintiff to prove the particular damage to each particular bale so receipted for, and that proof of general damage to the cotton in controversy is not sufficient. To support this contention reliance is placed upon the cases of the *Chicago, etc., R. Co. v. Provine, supra,* and *Illinois, etc., R. Co. v. Gross* (Miss.) 22 South. 946. These cases are not in point. They are actions against carriers for a failure to deliver cotton shipped over their lines. The instant case is a suit for damages to certain lots of cotton, set out in the bill of particulars, and the proof was sufficient to convince the jury that damage had resulted to this cotton through negligent handling of the same by the defendant company. It should be borne in mind that, while each bale of cotton damaged was not identified by reference to its own particular compress receipt, yet it was shown what the damage was to all the cotton, bale by bale, and that the bales so damaged were identified by marks and otherwise as being the identical cotton delivered to the compress company and described in the bill of particulars. We think this is sufficient.

We do not review the instructions given and refused, since they relate to the questions already considered and others which

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Brief for appellee.

we think are without merit. The jury was well warranted in believing that the damage resulted from the negligent conduct of the defendant; and, since the correct result has been reached along lines of substantial accuracy, we think the judgment should be, and it is hereby, *Affirmed.*

HERMAN PAFHAUSEN v. STATE OF MISSISSIPPI EX REL. ALBERT G. LOPOSER.

[South. 897.]

APPEAL. *Abstract question. Dismissal. Supreme court practice.*

If a case, involving alone a contest between the parties for an office, be submitted to the supreme court after the expiration of the term for which each claims to have been elected, the court will of its own motion dismiss the appeal as presenting only an abstract question.

FROM the circuit court of Harrison county.

HON. WILLIAM H. HARDY, Judge.

The state, on the relation of Loposer, appellee, was plaintiff in the court below; Pafhausen, appellant, was defendant there. From a judgment in plaintiff's favor defendant appealed to the supreme court.

The suit was a *quo warranto* proceeding to oust the defendant, Pafhausen, from the office of alderman of the town of Handsboro because of his being an alien, the contention of the plaintiff being that he was a subject of the kingdom of Holland, and not a citizen of the Uuited States, nor of the state of Mississippi, nor of the town of Handsboro. The opinion of the court further states the facts.

M. D. Brown, for appellant.

B. C. Bowen, for appellee.

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Statement of the case.

FLETCHER, J., delivered the opinion of the court.

This is a *quo warranto* proceeding, brought by the appellee on May 11, 1908, to oust appellant from the office of alderman of the town of Handsboro, a Code chapter town. Appellant was elected as alderman for the unexpired term ending January 4, 1909, a date which has now passed. This case was not submitted to this court until December 21, 1908, the very day on which this court adjourned for the Christmas recess. We do not, therefore, find that anything is left for us to decide, since neither party is now entitled to the office. Not being disposed to decide questions of no practical importance, we of our own motion dismiss this appeal. So ordered. *Dismissed.*

JAMES FROST v. STATE OF MISSISSIPPI.

[47 South. 898.]

1. CRIMINAL LAW AND PROCEDURE. *Rape. Assault to rape. Evidence. Particulars. Hearsay not admissible.*

In a prosecution for an assault with intent to rape, it is competent for the state to show that the prosecutrix complained soon after the assault, but the particulars of her complaint and of the offense as narrated by her are not admissible in evidence.

2. SAME. *Code* 1906, § 1359. *Indictment. Chaste character of woman.*

In order to convict under Code 1906, § 1359, providing that any person convicted of an assault with intent to ravish a woman of previous chaste character shall be punished by imprisonment in the penitentiary for life, or for such time as may be fixed by the jury, the indictment must charge the previous chaste character of the woman.

FROM the circuit court of Wayne county.

HON. W. H. HARDY, Judge.

Frost, appellant, a negro, was indicted and tried for an as-

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Brief for appellant.

sault upon one Lottie Whigham a female under the age of ten years, with intent to rape, was convicted, sentenced to the penitentiary for ten years, and appealed to the supreme court.

The opinion sufficiently states the facts. Code 1906, § 1359, under which the indictment was drawn, provides that a person convicted of assault with intent to ravish a female of previous chaste character shall be punished by imprisonment for life or for such lesser time as may be fixed by the jury. The indictment however failed to charge the previously chaste character of the female assaulted.

E. W. Stewart and *D. M. Taylor,* for appellant.

The court below erred in allowing the state, over appellant's objection, to offer in evidence the testimony of the grandmother of the prosecutrix. This testimony consisted merely of a recital of the supposed particulars of the alleged assault as made to the grandmother by the prosecutrix a short while after the alleged occurrence. The grandmother had no personal knowledge of the particulars. She merely narrated on the stand what her granddaughter had told her. The appellant was not present when the prosecutrix communicated the alleged facts to her grandmother, hence the testimony of the grandmother was incompetent. *Ashford v. State,* 81 Miss. 414, 33 South. 174; *Anderson v. State,* 82 Miss. 784, 35 South. 202; *Jeffries v. State,* 89 Miss. 643, 42 South. 801; *Dickey v. State,* 86 Miss. 525, 38 South. 776.

The indictment is defective for the reason that it fails to charge that the prosecutrix, at the time of the alleged assault, was of previously chaste character. Code 1906, § 1359. It is true that the indictment avers that the female was, at the time of assault, under the age of ten years, and it may be held, as an inference, that she could not be unchaste at such a tender age. But this should not change the rule that there should be strict compliance with the terms and provisions of the statute law in the framing of indictments based thereon.

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Opinion of the court.

George Butler, assistant attorney-general, for appellee.

It must be admitted that the testimony of the grandmother of the prosecutrix was incompetent. There was however only a general objection made to its introduction. Whether or not the admission of such testimony should work a reversal of the judgment, is respectfully submitted to this court.

While it is true that the indictment is drawn under Code 1906, § 1359, and fails to allege that the female was of previously chaste character, yet her chastity was clearly proved on the trial.

FLETCHER, J., delivered the opinion of the court.

Upon a prosecution for attempt to rape where there was a sharp conflict in the testimony, the court, over the objection of defendant, permitted the grandmother of the prosecutrix to detail the particulars of the affair as narrated to her by the prosecutrix shortly after the alleged assault. This has been repeatedly and emphatically condemned by this court, and this error has invariably resulted in reversal. *Ashford v. State,* 81 Miss. 414, 33 South. 174; *Anderson v. State,* 82 Miss. 784, 35 South. 202; *Jeffries v. State,* 89 Miss. 643, 42 South. 801; *Dickey v. State,* 86 Miss. 525, 38 South. 776. We sincerely hope that these cases will be carefully re-read by judges and prosecuting attorneys, that there may be an end to this familiar form of reversible error.

While this is sufficient to reverse the case, yet, since the case must be retried, we call attention to another manifest error in the conduct of the trial. This indictment was drawn under section 1049 of the Code of 1906, and charged accurately enough an offense under this statute. There was no averment in the indictment as to the previous chaste character of the female, and yet the court charged, in the fifth instruction given for the state, that the jury might fix the penalty and the number of years of imprisonment in the penitentiary, if the jury thought proper so to do. The jury, responding to this instruction, actually fixed the

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Statement of the case.

penalty at ten years' imprisonment in the penitentiary. This proceeding was, of course, based upon section 1359 of the Code of 1906, applying only to cases where the female is of previous chaste character. In order to convict under this statute, the indictment must allege the previous chastity of the female assaulted.

Reversed and remanded.

JAY DEE HOUSE v. STATE OF MISSISSIPPI.

[48 South. 3.]

1. CRIMINAL LAW AND PROCEDURE. *Murder. Evidence. Motive.*

A conviction of murder, otherwise supported by evidence, will not be reversed by the supreme court alone because the motive for the killing was not proved.

2. SAME. *Dying declaration. Predicate.*

A dying declaration, made after a physician had advised declarant that he could live only a few hours, and spoken, only two hours before his death, immediately following his statement that he believed he was going to die and would like to see his parents and his wife and that if he had to die he would die brave, is not subject to the objection that a proper predicate was not shown for its admission in evidence.

3. SAME. *Same. Competency.*

A dying declaration, which is the direct result of observation through declarant's senses, is admissible; but a declaration which comes from a course of reasoning from collateral facts is inadmissible.

4. SAME. *Same. Opinion. Killed without cause.*

A dying declaration that accused killed declarant without just cause is admissible as a statement of a fact, and is not objectionable as the opinion of the declarant, where the facts of the killing were known to declarant.

FROM the circuit court of Lee county.

HON. EUGENE O. SYKES, Judge.

House, appellant, was indicted and tried for the murder of

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Brief for appellant

James Putt, convicted, sentenced to the penitentiary for life, and appealed to the supreme court.

The opinion of the court states the facts.

Guy Mitchell, for appellant.

The fifth assignment of errors presents the question of the competency of the dying declaration of decedent. The declaration is manifestly the expression of an opinion and not one of fact, and therefore was improperly admitted. The defendant objected to the declaration made in these words: "He shot me without cause;" then to make the objection more specific and to meet the requirements of the court as announced in the *Lipscomb case,* 75 Miss. 777, 21 South. 657, as to objections being too general, defendant objected to the words "without cause" in such alleged declaration, because it was the expression of an opinion and not of a fact. There can be no point made in this case at bar that the objection is too general. In considering whether this statement was one of opinion or one of fact, the court must take into consideration the surroundings and relevant circumstances of declarant when the statement was made, and these things will materially aid in determining whether the statement is one of fact or not. The surroundings and circumstances as detailed in the evidence, negative the idea that this declaration is a statement of a fact. If the decedent were living and placed on the stand, he would not be permitted to testify that defendant shot him "without cause." The only thing he would be permitted to state with reference to it, would have been that he was making no hostile demonstration toward accused when the shot was fired. The cause for the shooting is clearly a question for the jury, and not one that can be answered by the decedent when under the shadow of death, when his mind must to some extent have been impaired; a time when inferences and opinions may appear to be facts, when the passions of anger and revenge are lingering to cloud the mind. The result of this practice would be to try a man out of court and without giving him a hearing.

In the *Payne case,* 61 Miss. 161, this court held that the state-

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ment: "Shot me without cause" was one of fact. The court gave no reason for its conclusion, and only one authority was cited to sustain the position, and that was *Wroe v. State,* 20 Ohio St. 460, which upon careful examination, shows that the court was hardly justifiable in reaching that conclusion. The next case to announce this doctrine was *Boyle v. State,* 105 Ind. 469, 97 Ind. 322, and the court was divided on the proposition; the dissenting opinion being the much clearer and showing the fallacy of the court's reasoning. As we stated, our court relied upon the *Wroe case* above cited, and we find that case is based on a decision of the Kentucky supreme court, *Handy v. Commonwealth,* 5 Crim. L. Mag. (Ky.) 47. That case cites *Rex v. Scaife,* L. M & R. 551, where the statement before the court was: "I don't think he would have struck me if I had not provoked him;" and the court admitted this upon the sole ground that it was in favor of the prisoner. The case of *Handy v. Commonwealth,* was also one in which the dying declaration was in favor of accused, and not against him. In this case it is said: "The general rule that declarations of deceased are admissible only when they relate to facts, and not to opinions, is subject to the exception that declarations of mere opinions of deceased, are admissible when favorable to the accused, and explained the conduct of the deceased." Thus we see that out court has followed the *Handy case* when it was based altogether on another rule of law. As proof of this assertion, we find that the supreme court of Kentucky in a later case than *Handy v. Commonwealth,* condemns the cases above cited, and shows wherein they are not analogous to the *Handy case.* See *Collins v. Commonwealth,* 12 Bush (Ky.) 271; in which the declaration was: "Michael Collins killed me and killed me for nothing." As to such a declaration the Kentucky supreme court says: "The statement that Collins killed the deceased for nothing," was but an expression of an opinion and was clearly inadmissible.

After careful examination of all the cases that even tend to hold that declarations of this character are admissible, it must

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appear that there is either a defective reason, or no reason at all, given for the decision. We call attention to two of these cases which attempt to give their reasons. In *Sullivan v. State,* 102 Ala. 142, it is put on the ground that the statement was of a collective fact. In *Boyle v. State,* 105 Ind. 469, the Indiana court says that: "He cut me without reason" is an inference of facts from observed facts, which of itself shows the error of the decision, as the statement of the court is a good definition of an opinion." There is a decisive test to which dying declarations must be subjected, and that is whatever may be stated by a witness under oath, is admissible in evidence as dying declarations made by him under the consciousness of approaching death: 10 Am. & Eng. Ency. of Law (2d ed.), 376, 377; *Whitley v. State,* 38 Ga. 50; *State v. Footyou,* 33 Pac. 537; *Lipscomb v. State,* 75 Miss. 559, 23 South. 210, 230. See also note of *Worthington v. State,* 56 L. R. A. 353; *Sweet v. State,* 107 Ga. 712, 33 S. E. 422, where the court says that a declaration of this character is one of opinion based on facts, or what he supposed were facts within his knowledge.

The dying declaration, admitted in evidence in this case, influenced the verdict to a great extent, as the other testimony for the state was in hopeless conflict with defendant's.

It is the duty of the district attorney to confine himself to the testimony in his argument to the jury, and we submit that the language used by the district attorney in his closing argument in this case, as shown by pages 173 to 175 of the transcript, should not have been permitted over defendant's objections, which were made at the proper time.

Anderson & Long, on the same side.

The state was permitted, over appellant's objection to introduce evidence, on the trial, as to the alleged dying declaration of the deceased to the effect that appellant shot him "without cause." While this ruling of the court below seems to be sustained by the case of *Payne v. State,* 61 Miss. 161, yet, in our

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view, the case cited should be overruled. "Without cause" means of course without legal cause. If the declarant did not have sufficient learning to know the law of self-defense, such a declaration would be entitled to no force whatever. To illustrate: It is the law that one is entitled to take the life of another, if necessary in order to prevent that other from committing a felony. How many laymen know this is the law? If, under such circumstances, a person were shot down, we venture the assertion that if he were asked by a by-stander, coming up after the shooting, why he was shot, he would say he was shot "without cause." Again, take a case where two persons have had an altercation, in which charges and counter-charges are made, by one against the other, of wrong doing, the matter winding up by one telling the other, "to prepare himself, and they would shoot it out the next time they met;" and afterwards, the one making the threat cools off and concludes he is in the wrong, and makes up his mind that the next time he meets his adversary, he will apologize to him and shake hands; and later they meet unexpectedly at a street corner, having seen in close proximity before they saw each other, and the party making the threat, with a view of carrying out his friendly purpose, makes a move to draw his right hand from his pocket, to shake hands and apologize, and the other not knowing his purpose, shoots him down. Clearly under the law, the party doing the shooting under these circumstances, is without guilt. What would the wounded man say in his dying moments, were he asked about the shooting? Our idea is he would say, what almost anyone would say under the same circumstances, that he was shot "without cause." Many other illustrations of the unsoundness of the principle announced in the *Payne case, supra,* might be made. We do not see how any court ever could have held that the language in question was a statement of fact.

We contend that *Powers v. State,* 74 Miss. 777, 2 South. 627; *Kendrick v. State,* 55 Miss. 436; *Jones v. State,* 30

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South. 759; and *Lipscomb v. State,* 75 Miss. 559, 28 South. 210, 230, are not authorities against us. In the *Powers case,* the dying declaration was, "You have killed me without cause." The court held that it was properly admitted as a dying declaration, as well as a statement made to the accused and not denied by him. In the *Kendrick case,* the dying declaration was, "You have murdered me without cause or occasion, and it was damn cowardly of you," addressed by the wounded man to the defendant, to which the latter made no reply. The court held the declaration admissible in evidence, as a charge not denied by the defendant. In the *Jones case,* "it appeared that the deceased, while sitting in a room at night, with her back to the window, was shot by someone on the outside, and died shortly thereafter. She made the dying declaration, that she thought 'the accused shot her; that he told her he would, if he saw any man talking to her that night.' " The court held this statement inadmissible, as not a fact, but an opinion.

There is a full discussion of this question in the chapter on Dying Declarations, 10 Am. & Eng. Ency. of Law (2d ed.), beginning at page 360, an in *Harper v. State* (Miss.), 56 L. R. A. 372, note.

The same rules that would govern in determining the competency of the declarant, as a witness if he were living, and the competency and relevancy of his statements if he were sworn as a witness, must be applied to determine the admissibility of his dying declaration. 10 Am. & Eng. Ency. of Law (2d ed.), 375.

In a case of shooting with intent to kill, would the wounded man on the witness stand be permitted to testify, that the defendant shot him "without cause?" Certainly not. The witness might honestly believe, in his ignorance of law, that it was done "without cause" when in fact it was done in self-defense.

In view of the fact that the defendant is not confronted by the witness, and has not the opportunity of cross-examination, dying declarations against his interests ought to be admitted with great

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Brief for appellant.

strictness, as to relevancy and competency They are hearsay, and in many respects are intrinsically weaker than other testimony. *Lambeth's case,* 23 Miss. 322.

In the *Lipscomb case, supra,* Judges WHITFIELD and THOMPSON, held this language admissible in evidence, "he said that Dr. Lipscomb had poisoned him with a capsule, he gave him that night," while Judge MAGRUDER held the whole of the statement was merely an expression of opinion, and not a statement of fact. We contend that this case is not an authority against us. The testimony in the *Lipscomb case* showed that as soon as the deceased took the capsule, he was taken violently sick and begun to vomit. The deceased knew as a matter of fact, that Dr. Lipscomb had prepared the capsule for him, and knew what its contents was. He knew that it was the cause of his violent sickness. His statement that "Dr. Lipscomb poisoned him" was only another way of stating, that he gave him the capsule. His statement would have been just as damaging against the defendant Lipscomb, if he had left out that part in reference to the poisoning. The statement of the deceased in the *Lipscomb case, supra,* involved no question of law, as it does in the instant case. As to who gave the deceased the capsule, and its contents, and its effects, were purely questions of facts, and inferences of fact drawn from facts, at most, while in the instant case, "he shot me without cause" is really an application of law to the facts, because it necessarily carries with it the understanding of the law of self-defense by the decedent, about which he may have been mistaken.

The judgment ought to be reversed because of the argument of the district attorney, which was objected to by appellant. The appellant objected several times to this harangue of the district attorney, but the court below overruled such objections, and permitted the district attorney to continue as before. In that part of his speech objected to, the district attorney was permitted to tell the jury, in substance as follows: "That in counties where juries failed to do their duty, such counties ran red with human

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Brief for appellant.

blood;" "that in counties where they did their duty, such counties blossomed like the rose; that the instructions given by the court was a book of instructions; a great mass of instructions; a volume of instructions;" that defendant's attorneys would "read and read and read these instructions, until in the name of common sense, you will think they are never going to quit;" "that he was reminded by these instructions of a little story of the spider and the fly." "This (meaning the instructions), gentlemen of the jury, is a web of the spider, in which you might become entangled." This court has reversed many cases on account of arguments made by district attorneys, very much less prejudicial and unjust, than the one in this case. We refer the court to the following authorities, where questions more or less prejudicial and unjust, than the one in this case. We refer the court to the following authorities, where questions more or less like the one here, were involved: *White v. State,* 87 Miss. 564, 40 South. 324; *Long v. State,* 81 Miss. 448, 33 South. 224; *Sykes v. State,* 89 Miss. 766, 42 South. 875; *Middleton v. State,* 31 South. 809; *Fuller v. State,* 85 Miss. 206, 37 South. 749; *Hampton v. State,* 40 South. 545; *Bryant v. State,* 33 South. 225; *Lee v. State,* 75 Miss. 625, 23 South. 628.

Alexander & Alexander, on the same side.

There was no motive shown for the killing. Appellant and deceased were close friends and associates. There had been no quarrel or estrangement. The witnesses, who were taken from among their companions, concur as to this. Certainly, up to the time the game began, there had not even been an unpleasant word between them. Equally true is it that nothing happened during the game that could possibly furnish a motive for assassination, for such the crime was if there was any crime. Not even a dispute of any kind arose during the game. There was no claim that any one was cheating or being cheated. It is not even shown that appellant lost any money, especially to deceased. The learned attorney general in his brief plants himself on the

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theory that Dee and Porter House planned to assassinate Jim Putt and Hunter Moore because these two had won in the game while appellant had lost. In order then to convict, the court must believe that both the appellant, Dee House, and his brother Porter House formed the deliberate purpose to foully assassinate their companions. Not only this, but this court must believe that both of them were such incarnate fiends that they conspired to assassinate their friend for no other reason than that Dee House lost to some one in the game or to all of them together a few paltry dollars. We are not unaware of the fact that convictions may be sustained in some cases where the state is wholly unable to prove a motive, but where the proof negatives the existence of a motive and all the other facts and circumstances show improbability of guilt, the absence of a motive is a very pregnant circumstance. We contend that none is shown in this case and that none can be implied or presumed under the proven facts. Even during the game, it appears that far from being at variance appellant was favored by Putt with a loan.

Not only was no motive shown, but not a word was spoken by appellant to indicate anger. His conduct was open, and his movements wholly inconsistent with any purpose to assassinate. His gun was not hidden, but leaning against the house where every one passing in and out, as they frequently did, might have seen it. Porter House had no gun until after the killing, when he got one from the rack at a neighbor's house. The contention, if advanced, that some provocation arose that caused the appellant, Dee House to go home for his gun in order to kill Putt is not sustained by any evidence, and is wholly untenable. After returning he played in the game as pleasantly as before. While all the young men were drinking, it is not shown that appellant was a violent man, whatever other faults he may have had. It is wildly improbable that House if he had intended or expected to assassinate Putt would have done so immediately before the house in the presence almost of two of Putt's relatives, when deception would have been impossible and detection sure. If it be

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said that appellant was drinking, and therefore the probability is that he shot Putt, we answer that Putt was drinking more and there was greater probability that Putt was the aggressor in the difficulty outside of the house. Putt is shown to have been a violent, dangerous man. He was armed and so reckless with his pistol, that he had, without reason or provocation, shot it off during the game just to be shooting.

It was not shown that the so-called dying declarations were made under a fixed belief of impending death. It is claimed by the state that this point was not sufficiently reserved. It is the duty of the court always to pass upon the sufficiency of the proof to show admissibility of a dying declaration. When the physician was asked what the deceased said to him about the killing, objection to this was made by the appellant. We think the objection was sufficiently reserved. When the physician was first asked, whether the deceased made a statement, and whether at the time he made it he knew he was going to die, he in answer thereto was proceeding to give the statement in evidence when counsel for appellant objected and told him to delay a moment. The court below then heard the statement, and the district attorney again asked what he said about the killing? Again there was an objection by appellant. The motion for a new trial assigns as its seventh ground that the court erred in admitting the dying declaration of deceased over appellant's objection. This sufficiently presents the objection for consideration by this court. What was the declaration when admitted? It was as twice repeated that "if he had to die he would die brave." It is true the witness affirmed that Putt stated that he wanted to see his father and mother; that he was going to die, but this was not all he said, nor all of the sentence. The sentence was a sfollows that "he was going to die and he believed he was and he wanted to see his mother and father and would like to see his wife, he would like to talk to her before he died, he also said, if he had to die he would die brave; that was another statement he made, I believe I never stated that before, but it is a fact, that if he was going to

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Brief for appellee.

die he would die brave and wouldn't die a coward." Nothing is better settled in the law of evidence than that dying declarations are inadmissible if made when there was any hope, however slight, of recovery, or any doubt, even the least, that the declarant was about to die. The cases in our court illustrating the admissibility of dying declarations are numerous. We cite the court to *Harper v. State,* 79 Miss. 575, 31 South. 195; *Brown v. State,* 78 Miss. 637, 29 South. 519; *Joslin v. State,* 75 Miss. 838, 23 South. 515; *Bell v. State,* 72 Miss. 507, 17 South. 232; *Brown v. State,* 32 Miss. 433; *Lewis v. State,* 9 Smed. & M. 115. See also Wigmore, Ev. §§ 1440, 1447.

George Butler, assistant attorney-general, for appellee.

The predicate for the admission of the dying declaration of the deceased was properly laid. It was shown in evidence that the deceased was shot at about half past four o'clock of the early morning and that he died about three hours later; that when the physician reached him, deceased was almost pulseless. The physician told him that he was bound to die, that at the utmost he could survive for only a few hours. The dying boy then made the declaration implicating appellant; and shortly afterward died. The deceased understood that he was in the presence of imminent death when the dying declaration was made. No objection to the admission of the dying declaration was made in the court below. Under the circumstances there was no reversible error in its admission before the jury. *Lipscomb v. State,* 75 Miss. 559, 23 South. 210, 230.

It is contended by appellant that the phrase of the declaration, "without cause," was improperly admitted, because of the alleged reason that it was an opinion or conclusion of the declarant. The declaration was to the effect that "Dee House killed him, and had killed him without cause." This was objected to by appellant, and the objection was by the trial court overruled. Then appellant objected to that part of the statement to the effect that the killing was "without cause," and this objection was also

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overruled. The general objection was of course properly overruled. The statement, "Dee House had killed him," was a statement of fact; in fact it is admitted by appellant that this part of the declaration was correct. Had the specific objection been sustained, the statement then admitted would have been that "Dee House killed him, and killed him ——" which would have been senseless and meaningless.

If we concede, however, that the question of admissibility of the last clause of the declaration was sufficiently raised, still there was no error in admitting the whole declaration. In *Payne v. State,* 61 Miss. 161, this court held that a statement "that the defendant shot him without cause," was a statement of fact and not an opinion or inference of the declarant. In *Powers v. State,* 74 Miss. 777, 21 South. 657, this court said that "the evidence of the statement made by the deceased to the accused, to the effect that 'you have killed me without cause,' was properly admitted as a dying declaration, as well as being a statement made to the accused and not denied by him." In *Kendrick v. State,* 55 Miss. 436, it appears that the deceased said to the defendant some few minutes after the shooting," "Kendrick, you have murdered me without cause or occasion, and it was a damn cowardly act." To this Kendick made no reply. This court said, "This was not admissible as part of the *res gestae,* because it occurred some time after the shooting, and was merely a narrative of the past. It was not admissible as a dying declaration because not made under the solemnity required in such case."

In the case of *Jordan v. State,* 81 Ala. 20, it appears that a declaration as follows, "I am not drunk, but sober. Jule shot me and Handy cut me, and all for nothing," was held to have been properly admissible before the jury. In the case of *Sullivan v. State,* 102 Ala. 135 the following declaration was held admissible: "Sullivan cut me. He cut me for nothing. I never did anything to him. May God forgive him." To the same effect is *Fuller v. State,* 117 Ala. 36. In *People v. Farmer,* 77 Cal. 1,

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the following conversation between the witness and the dying man was admitted: "What did he shoot you for?" "He shot me for nothing." Practically the same case is *People v. Abbott* (Cal.), 4 Pac. 769. See also the case of *Derby v. State,* 79 Ga. 63, where the admitted dying declaration was: "O Lord, they have murdered me for nothing in the world." In *State v. Lee,* 58 S. C. 335, the admitted declaration was "Fannie, Max has shot me. He killed me in my own house for nothing, a drunken fool."

See also the following cases to the same legal effect: *Roberts v. State,* 5 Tex. App. 141; *Pierson v. State,* 21 Tex. App. 14; *Sims v. State,* 36 Tex. Com. App. 154; *Brown v. State,* 128 Ala. 6; *White v. State,* 100 Ga. 659; *Loney v. State,* 151 Ind. 511; *State v. Gile,* 8 Wash. 12; *State v. Nettlebush,* 20 Ia. 257; *State v. Saunders,* 14 Ore. 300; *Wroe v. State,* 20 Ohia St. 460; *State v. Keesler,* 14 Utah, 142; *Boyle v. State,* 97 Ind. 322; *Boyle v. State,* 105 Ind. 470. See also 21 Cyc. 988; and monographic note to *Myers v. State,* 86 Am. St. Rep. 640; and also 2 Wigmore, Ev. §§ 1440 1447.

The remarks of the learned but energetic district attorney were not beyond the pale of legitimate argument.

Argued orally by *W. D. Anderson* and *C. H. Alexander,* for appellant and by *George Butler,* assistant attorney-general, for appellee.

POWELL,* Special Judge, delivered the opinion of the court.

This is an appeal from the circuit court of Lee county. Appellant was indicted for the murder of Jim Putt, and tried, convicted, and sentenced to the penitentiary for life. We gather from the evidence adduced that appellant and deceased, with a party of some four or five others, had gathered about dark at a

* Judge Fletcher, having been of counsel for the state before his appointment to the bench, recused himself in this case and Robert Powell, Esq., a member of the supreme court bar, was appointed and presided in his place.

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small cotton house in an old field, and engaged in a game of craps and the consumption of several quarts of whiskey. The gaming and drinking continued until between three and four o'clock in the morning. During this time several of the party retired from the game to go to their homes for money. Appellant early in the night, getting out of money, pawned his pistol to one Hunter Moore, who was in the game, and some time about three o'clock in the morning, being again short of funds, left the house with his brother Porter, ostensibly to get more money. In a few minutes he returned with a double-barrelled shotgun, and some of the witnesses say Porter brought a gun also. The state witnesses testify that at this point Dee House, the appellant, called from just outside the door of the cotton house to Jim Putt, who was on the inside, to come out as he wanted to see him, and that when Putt, the deceased, came out and started towards him, the appellant shot him with a gun when he was making no hostile demonstration whatever. The witnesses for the defense denied all this, and claimed that the first shot was from a pistol and fired by some one unknown, other than appellant, and that before appellant fired he said, "Boys, don't come on me." There was a dispute as to the number of shots fired; the state witnesses testifying there were four shots from shotguns only, and the witnesses for the defense saying there was one pistol shot and two shotgun reports. There was also a dispute as to whether the deceased had a pistol or not; but when stripped, no weapon was found on his person, nor was any seen at the place where he fell. No one except appellant claims to have seen deceased shoot at appellant or attempt to draw any weapon upon him; but he claims that deceased did both.

When deceased was shot, all parties fled from the scene of the killing, leaving deceased, who was shot in the stomach, lying upon the ground, where he remained until the doctor came, about an hour afterwards. The deceased lingered for two or three hours, and died. Before he died the attending physician told him he could not live more than five or six hours, after which he

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made the following statement as a dying declaration: "He said he wanted to see his father and mother; that he was going to die; that he believed he was, and would like to see his wife. He would like to talk to her before he died. He also said, if he had to die, he would die brave. He said that Dee House had killed him, and killed him without cause."

There are eleven errors assigned by the appellant in his assignment of errors; but after a careful examination of the record, we find that only the first, fifth, and eleventh are worthy of serious consideration, and these are the only errors seriously urged sel for appellant.

The first error assigned is that the court erred in not sustaining defendant's motion for a new trial on the ground that the jury found contrary to the evidence. In support of this assignment it is strongly urged that no motive was shown for the killing. It is true that the record in this case does not disclose any adequate motive for the awful tragedy; but, while such disclosure may and often does give tone and color to the action of the parties, it is not absolutely necessary to show the motive in order to sustain conviction, for sometimes knowledge of the secret motive may die with the dead man, or be locked up in the breast of the slayer. While the facts in this case are much disputed, we are not prepared to say that the jury, who heard all the testimony, saw the witnesses, and knew their manner of testifying, were not fully justified in the verdict rendered.

The eleventh error assigned is that the district attorney, in his closing argument, over the objection of defendant, was permitted to comment on the numerous instructions given for the defense, and to warn the jury of the necessity of doing duty to keep the country from running red with blood. In support of this assignment a long excerpt from the speech of the district attorney is copied in the record. This court has always jealously guarded the rights of defendants against unwarranted attacks by too zealous attorneys for the state, and has frequently reversed judgments in favor of the state for that reason; but in this case,

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after a most careful reading of his remarks, we are unable to say that the district attorney has transgressed the bounds of legitimate argument or gone beyond the scope of reasonable comment.

The next and last assignment which we shall notice in the fifth in the appellant's assignment of errors, to wit: "The court erred in admitting the dying declaration of deceased over defendant's objections." In support of this assignment two points are urged: First, that the proper predicate was not laid; and, second, that what was said was not the statement of a fact, but only the expression of an opinion.

First, then, as to the predicate. The deceased had been grievously wounded in the stomach and was unable to arise, though he had dragged himself a few feet from the spot where he first fell. The attending physician had told him, but a short time before the declaration, that he had but five or six hours to live, and in fact he died within two hours. The declaration was as before stated: "He wanted to see his father and mother; that he was going to die; that he believed he was, and would like to see his wife before he died; that, if I have to die, I want to die brave. He said that Dee House had killed him, and killed him without cause." It is ably urged by counsel for appellant that the use of the words "if I have to die" by deceased raises a reasonable doubt of his entire conviction of impending dissolution. Taking into consideration all that deceased said, and the condition under which his declaration was made, we think deceased was fully conscious that his end was at hand, and that his declaration was made under the realization and solemn sense of impending death, and therefore hold that the proper predicate was laid.

The question as to the admissibility of the latter part of his statement, to wit, that "Dee House killed me, and killed me without cause," presents a more serious question. The distinguished counsel for appellant very strongly urge that the expression "he killed me without cause" is not a statement of fact, but only the expression of an opinion, and hence not admissible in

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evidence. The courts of last resort in the various states are undoubtedly somewhat divided upon this question, as will be seen from an inspection of the very elaborate and able briefs of counsel on both sides of this case, though the large majority hold that the words used in this case, and kindred expressions, are admissible as statements of fact, and not mere expressions of opinion. For an exhaustive collation of authorities on this point, see Wigmore on Evidence, vol. 2, § 1447, and notes thereunder. This court has twice directly passed upon the question at issue. In the case of *Payne v. State,* 61 Miss. 161, Judge CAMPBELL, speaking for this court, says that the statement "that the defendant shot him without cause was a statement of fact, and not an opinion or inference of the declarant," and was admissible. In the case of *Power v. State,* 74 Miss. 777, 21 South. 657, this court, speaking through Judge WOODS, said: "The evidence of the statement made by the deceased to the accused to the effect that 'you have killed me without cause' was properly admitted as a dying declaration, as well as a statement made to the accused and not denied by him." Inferentially this court adopted the same view in the cases of *Kendrick v. State,* 55 Miss. 436, and *Lipscomb v. State,* 75 Miss. 559, 23 South. 210, 230.

To us the true and proper test as to admissibility is whether the statement is the direct result of observation through the declarant's senses, or comes from a course of reasoning from collateral facts. If the former, it is admissible; if the latter, it is inadmissible. *State v. Williams,* 67 N. C. 12; *Lipscomb v. State,* 75 Miss. 559, 23 South. 210, 230. If the facts, as shown by all the testimony, as in the case of *Jones v. State,* 79 Miss. 309, 30 South. 759, could not have been known to the declarant, then his statement would necessarily be founded on inference, rather than known facts, and would be an opinion not admissible; but if, as in this case, everything, as shown by all the evidence, was fully known to declarant, we fail to see why his statement that the killing was without cause was not the statement of a fact, and admissible. We prefer to stand with the majority

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Statement of the case.

of the courts and with our own previously expressed opinion, and hold that the declaration in this case was one of fact, and not one of mere opinion.

We therefore hold that the judgment of the lower court in admitting this dying declaration was correct, and it is affirmed.

Affirmed.

GULF & SHIP ISLAND RAILROAD COMPANY v. MISSISSIPPI RAILROAD COMMISSION.

[49 South. 118.]

RAILROADS. *Stopping trains. Power of commission. Code* 1906, §§ 4849, 4854.

The Mississippi Railroad Commission is without power to compel a railroad company to stop its passenger train at a point, without the limits of a city, where it has no regular station, although its line crosses the track of another railroad company at the place and the latter maintains a passenger station there; such power is not given by:—

(a) Code 1906, § 4849, empowering the commission to determine complaints of time schedules and regulate the times for arrivals and departures of trains to and from regular stations; nor

(b) Code 1906, § 4854, providing that railroads shall establish and maintain such depots as shall be reasonably necessary for the public convenience and shall stop such of its trains thereat as business and public convenience may require; nor

(c) Any other statute of the state.

FROM THE MISSISSIPPI RAILROAD COMMISSION.*

The Mississippi Railroad Commission, appellee, claiming authority under Code 1906, §§ 4849 and 4850, on the 8th of September, 1908, entered an order on its minutes directing the Gulf & Ship Island Railroad Company, appellant, to stop its south

* This case was the first one appealed to the supreme court directly from the Mississippi Railroad Commission, under Code 1906, § 4890, providing for such appeals.

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Brief for appellant.

bound passenger train, for the reception of passengers and their baggage, near where its track crosses the line of the Mississippi Central Railroad Company on the outskirts of the village of Silver Creek in Lawrence county. The Mississippi Central Railroad Company had established and was maintaining a station, depot or stopping place near the intersection of the two roads, but appellant never had done so.

From the order or judgment the appellant prosecuted a direct appeal to the supreme court.

McWillie & Thompson, R. L. Dent and *J. H. Neville,* for appellant.

Under the provisions of Code of 1906, § 4890, wherein the right to this appeal is found, appellant can only complain of the commission's want of power in the premises.

The school boy's composition on "Snakes in Ireland," a model of excellence entirely covering the subject, consisted of but six words, "There are no snakes in Ireland," and our argument on the general question of the commission's power to make the order appealed from might well be made to consist of but five, "No statute grants the power." We will, however, add, by way of elaboration, that the express powers conferred on the commission touching the stopping of trains and location of depots by necessary implication negative the power claimed for it in this case. The power most in point is conferred by Code 1906, § 4854, authorizing the commission to cause all passenger trains to be stopped for passengers to get on and off in a city at any place other than a depot where it is for the convenience of the traveling public. This power is expressly limited to places in a city and this court judicially knows that the railroad crossing in question is not in a city, that Silver Creek itself, and a point three fourth of a mile away from that village are not cities. The jurisdictional facts are not apparent of record to warrant the conclusion that the commission acted upon the idea that the crossing in question was in a city.

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Brief for appellant.

The statutory language under consideration is the exact equivalent of an express provision negativing the power of the commission to require trains to stop in the country, in villages or towns.

It will be observed that the order of the commission does not purport to require the railroad company to establish a depot at the crossing away from the town and three quarters of a mile from its established depot; the place is not within an incorporated city, town or village, and no question arises on the first or the first part of the second sentence of Code 1906, § 4854.

The effort of adverse counsel to find warrant for the commission's order in Code 1906, § 4849, almost amounts to a confession of error. Whatever power is conferred on the commission by that section is conditional, dependent upon the existence of a complaint which in the language of the statute "must be in writing, and specify the grounds of complainant . . . against which complaint is made." The whole section clearly contemplates a moving party, a complaint in writing, etc. In this case there was no party complainant nor written complaint. In the absence of either, the power was not conferred on the commission; it was without jurisdiction of the subject matter and the order or judgment appealed from should be reversed and vacated and the proceeding dismissed. Under a statute conferring power conditionally the commission has no power unless the conditions exist. This court has no power by virtue of its general appellate jurisdiction to reverse the judgments and decrees of circuit and chancery courts; it has power to do so only when causes are properly brought before it by appeal in accordance with statutory regulations. This court has just as much implied power as the railroad commission. The process of broadening power by implication is fraught with grave dangers.

The case cited by the attorney general in his supplemental brief, *North Carolina Corporation Commission v. Atlantic Coast Line R. Co.* 137, N. C. 14; S. C. 49, S. E. 191, affirmed 206 U. S. 1, is not at all adverse to appellant's contention.

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Brief for appellant.

Under the North Carolina statute, Laws N. C. 1899, p. 291, ch. 164, it was expressly provided that the commission should have:-

(a) Such general control and supervision of railroads as might be necessary to carry the statute into effect; and

(b) That all common carriers shall afford reasonable, proper and equal facilities for the interchange of traffic and forwarding freight and passengers *and shall make as close connection* as practicable for the convenience of the traveling public.

This statute affirmatively granted the power there and here in question. The North Caroilna contest was over the validity of the statute and the decision simply upheld legislative power. Here the contest is whether the legislature has ever acted authorzing the commission in the premises. We say no; and unless the attorney-general has more pertinent authority for the maintenance of the commission's cause than the North Carolina case, appellant is surely entitled to a reversal. The power granted the North Carolina commission was not conditional but absolute.

The court having propounded for discussion the question whether the words "any depot" in the first sentence of Code 1906, § 4854, relate to the depots of another railroad company than the one by which it was established and is maintained, we shall limit our observations to that exact question, after craving pardon for calling attention to the fact that the question is academic, since the record fails to show with accuracy that the Mississippi Central Railroad Company has or had a depot at or near the crossing of the two roads in the vicinity of Silver Creek.

The word "depot," embracing its use once in the plural, is used five times in the code section under consideration, and four out of the five times, certainly, is used as meaning depots belonging to the company establishing and maintaining them. The word "depots" in the second line of the section is so used; it is part of the statute directing the establishment and maintenance of depots, and no man can reasonably contend that a railroad company is required to establish and maintain the depots of

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other companies. There is no express limitation in the sentence to depots on a company's own line, and, if we depart from the implied limitation a railroad company may be required to maintain a depot at a river steam-boat landing or anywhere else in the woods, many miles from any railroad track. The very nature of the subject matter causes us to reject a construction of the statute leading to such absurdities. The shock to common sense is but less in degree when we consider the statute as requiring the establishment and maintenance of depots by a railroad company on the lines of other companies, over whose tracks it has no control.

The word "depot" used in the fifth line of the section just as clearly refers only to the company's own depots, for no man can reasonably contend that a railroad company is obliged to establish and maintain a depot for or on the line of some other railroad, although in a city through which it passes. If the word "depot" at the beginning of the fifth line of the section can be construed as embracing a depot of another company then a railroad company can be compelled to construct and maintain a depot for and on the track of another company wholly off of its own line. The second sentence of the section, like the first, has no express limitation restraining its scope to depots on a company's own line.

The word "depot" in the fourth line from the bottom of the section manifestly refers to the depots which by the preceding part of the sentence the companies are required to maintain; and here too we find no express limitation to places on the company's own line at which persons must be permitted to get on and off passenger trains; but the legislature never contemplated that passenger trains should depart from the company's own rails; they are not required even to go upon the rails of other railroads. Unless a limitation can be implied, confining the places for the getting on and off of passenger trains on the railroad company's line, the commission has power to require a passenger train to stop and allow passengers to get on and off at any place in a city

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it may designate, although it be off of and away from all rails and railroads. Of course this conception is absurd, but it demonstrates that there is an implied limitation confining the places to points on the company's own line; it has control of none other.

In the second line from the bottom of the section the word "depot" is used in such a way that no sensible construction can make it refer to depots of other companies. It too by necessary implication refers only to the company's own depots and not to those of other companies.

The word "depot," therefore, is used in the same section of the statute four out of five times in a sense limiting it to a company's own depots. How is it used in the third line, the only other time employed in the section?

The words "any depots" as used in the third line of the section are not so broad as the words "such depots" in the second line; the words "such depots" embrace all, both freight and passenger depots, reasonably necessary for public convenience. It was not deemed essential that railroad companies should stop their passenger and freight trains at all depots; certainly passenger trains are not required to stop at freight depots and freight trains are not required to stop at passenger depots; therefore, the latter clause of the first sentence of the section provided that every railroad "shall stop such of the passenger and freight trains at" (not such depots, for that would have required all trains to stop at every depot, but) "at any depot as the business and public convenience shall require." The words "any depot" means those of "such depots" as the business and public convenience may require, they relate back to "such depots" and are a part of them; and we have already seen that "such depots" mentioned in line two of the section are those which a company is required to establish and maintain, and nothing could be more absurd than a contention that a company can be forced to establish and maintain depots on the lines of other companies.

In the case of *Regina v. Commissioners of Poor Laws, etc.*, 6 A. & El. 68, 69, the Chief Justice of the King's Bench said:

"We disclaim altogether the assumption of any right to as-

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sign different meaning to the same words in an act of Parliament on the ground of a supposed general intention in the act. We thing it necessary to give a fair and reasonable construction to the language used by the legislature; but we are not to assume the unwarrantable liberty of varying the construction for the purpose of making the act consistent with any views of our own."

A word repeatedly used in a statute will bear the same meaning throughout the statute, unless a different intention appears. Sutherland on Statutory Construction, § 255, and authorities cited.

J. B. Stirling, attorney general for appellee.

It is not possible to properly construe section 4854, Code of 1906, without considering all of the statutes upon the subject of the regulation of railways.

For, "to ascertain the intent of a law, it is competent to look to the state of affairs existing at the time of its enactment" and "all statutes relating to the same subject must be taken as one system and construed consistently if this can be done." 46 Miss. 157, 45 Miss. 145, 45 Miss. 294, 46 Miss. 581.

The general intent of the legislature is to be arrived at and this can only be done by a consideration of the chapter relative to supervision of common carriers enacted in the light of the constitution and carrying out the plain provisions thereof.

Section 184 of the constitution, is in part, as follows:

"Section 184. * * * Every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad; and all railroad companies shall receive and transport each others passengers, tonnage and cars, loaded or empty without unnecessary delay or discrimination."

By section 4839 of the chapter on supervision of common carriers railroads are declared to be public highways and not allowed to discriminate and this means a discrimination in service as well as otherwise.

By section 4849, the commission is required to "docket, hear

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and determine all complaints made of any time schedule, etc. . . . on the ground that the same in any respect, is, in the case of time schedule, unnecessarily inconvenient for the public, etc."

This necessarily implies a regulation of the schedule of the railroad companies and the schedule is nothing more than a time sheet showing when trains shall depart from initial stations and arrive at the terminus of the railroad company and the time when it shall arrive at and depart from intermediate stops. If the order of the commission regulating the schedule is reasonable then it must be obeyed.

Under the decision in *Minn. St. P. etc. R'y Co. v. Railroad Commission*, 16 N. W. 905, the court said:

"Construing a statute which provides that on complaint the commission might require change in the service, the commission might upon its own motion make the necessary order."

By section 4854 railroads are required to "stop such of the passenger and freight trains at any depot as the business and the public convenience shall require."

This means what the language plainly indicates that the trains on the railroad shall be stopped at any depot that the railroad passes. Where the language is plain there is no room for construction and the record showing that at this crossing the Mississippi Central Railroad maintains a "passenger station and stopping place" there is no room for the argument that the record fails to disclose that there is a depot at the crossing.

By section 4863, the railroad commission is empowered to designate the site for location of the depot and by section 4864 it may require the erection of union passenger depots and "transfer stations" and certainly the power would be implied to require trains to stop at stations after the same had been erected.

By section 4843 the railroad commission is empowered to "fix the charge of and shall supervise and regulate all persons, natural or artificial, who may own or operate, express, telegraph, telephone or sleeping car companies or other associations governing or controlling cars or rolling stock of railroads in this state in the same manner as railroads."

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And by section 4879 "The railroad commission shall require all the necessary information from such companies and shall make such reasonable orders for their supervision and regulation from time to time as to their charges and otherwise as the public interest may require.'

This shows what the intention of the chapter is relative to railroad companies and that a general supervision is given over railroad companies to the same extent as is given over other companies mentioned.

By section 4886 one or more commissioners shall visit each county and see if the community is discriminated against and if the community is discriminated against the commission is required to remedy same.

By section 4858 the railroad commission as a whole is required, as far as practicable to visit stations and investigate to see what order or rules are not being complied with and to require that they be complied with.

By 4896 the railroad companies are required to stop at crossings unless the commission relieves them.

It will be recalled that section 1353 inflicts a penalty for failing to stop unless excused by reason of order entered under section 4896.

It was the plain intent of the constitution as disclosed by section 184 that railroads should receive and transport one another's pessengers without unnecessary delay, and this requirement that legislation for supervision of railroads was instant case must be obeyed.

Section 186 of the constitution requires the legislature to pass laws for the supervision of railroads and it was under this requirement that the legislature for supervision of railroads was enacted.

Corporation Commission v. Railroad, 137 N. C. 14, commonly referred to as the *"Railroad Connection case,"* deals with the right of railroad commission to force two independent intersecting lines to so arrange their schedule as to make connection at the point of intersection. The order required one of the lines

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to quicken its schedule so as to arrive at the connecting point, in this case, Selma, N. C., some twenty minutes earlier than it had formerly done, and further required the other railway to detain its train at Selma for fifteen minutes in order to assure the connection. It will therefore be readily seen that the case in some respects was strikingly like the one under consideration. It was earnestly insisted that the corporation commission of North-Carolina was without authority to make the order, but this contention was disallowed by the court in a characteristic opinion by Judge CLARK. I ask the court's attentive consideration of the opinion in this case, as it reviews many of the best authorities in the United States. The authority of the commission to make the order was based upon the statutes of North Carolina, and one of those most relied on was the one which conferred upon the commission "general control and supervision of all railroad companies, etc." Compare this provision with those sections of our chapter on Supervision of Common Carriers which give power in general terms to the commission to regulate and supervise all common carriers.

This North Carolina case, it should be noted, has been affirmed by the supreme court of the United States in *Atlantic Coast Line R. Co. v. N. C. Corp. Com.*, 206 U. S. 1 (51 L. Ed. 933) in an able opinion by Mr. Justice White.

Argued orally by *R. H. Thompson,* for appellant and by *J. B. Stirling,* attorney general, for appellee.

WATKINS,* Special Judge, delivered the opinion of the court.

Upon the 8th day of September, 1908, the railroad commission of the state of Mississippi passed an order requiring the appellant, the Gulf & Ship Island Railroad Company, to stop its

* FLETCHER, J., having been of counsel in the case before his appointment to the bench, recused himself and WM. H. WALKINS, Esq., a member of the Supreme Court bar, was appointed and presided as special judge in the case.

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regular south-bound passenger train for not more than thirty minutes at the intersection of the Mississippi Central Railroad, the point of intersection being three-quarters of a mile north of the depot of the appellant road in the village of Silver Creek, and wait for the east-bound passenger train on the Mississippi Central Railroad, and to receive and discharge passengers, and baggage at said intersection. It is shown from the record that the appellant maintained no depot or stopping place at this point; that it had a regular depot and stopping place in the village of Silver Creek, as above stated; but that the Mississippi Central Railroad had and maintained a depot very near the point of intersection. From this order, under section 4890 of the Code of 1906, the Gulf & Ship Island Railroad Company, the appellant has prosecuted this appeal, which presents for our determination the question of the power of the railroad commission to make the order complained of.

This appeal involves the concrete question of law as to whether or not the railroad commission had the authority under the law to compel a railroad company to stop its passenger trains at the intersection of another railroad, not being within the limits of any city, at which point it had no regular depot or stopping place, and wait thirty minutes for the train of another railroad, and at said point receive and discharge baggage and passengers. The railroad commission of the state of Mississippi is a creature of the legislature. It exists only by virtue of chapter 139 (sections 4826–4899) of the Code of 1906, and all of its powers and duties are therein specifically enumerated. It may be stated, in this connection, that we have no general statute submitting to the railroad commission general supervision over railroad companies, as will be found in some states; and, while general power is given to the commission to do many things, however, in each instance it will be found that the power is specifically granted. It is universally held that a railroad commission is a mere administrative or advisory board created to carry out the will of the legislature, and that, before

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it can do any act, it must be able to point to its grant of power from the legislature, which power must affirmatively appear, and must be given in clear and express terms, and nothing will be had by inference. *State v. Yazoo & Miss. Valley R. R. Co.*, 87 Miss 679, 40 South. 263; 23 Am. & Eng. Ency. of Law (2d ed.) p. 653; *Railroad Commission v. Navigation Co.*, 17 Or. 65, 19 Pac. 702, 2 L. R. A. 195; *Railroad Company v. R. R. Com.*, 73 Kan. 168, 84 Pac. 755; *Blake v. R. R. Co.*, 73 N. H. 597, 64 Atl. 202; *Jones Bros. v. Sou. Ry. Co.*, 76 S. C. 67, 56 S. E. 666; *State v. R. R. Com.*, 47 Wash. 627, 92 Pac. 459; *Railroad Commission v. W. U. T. Co.*, 113 N. C. 213, 18 S. E. 389, 22 L. R. A. 570. In the case of *Railroad Commission v. Navigation Company, supra,* the supreme court of the state of Oregon uses the following language: "It has for a very long time been considered the safer and better rule, in determining questions of jurisdiction of boards and officers exercising powers delegated to them by the legislature, to hold that their authority must affirmatively appear from the commission under which they claim to act. There is too strong a desire in the human heart to exercise authority, and too much of a disposition upon the part of those intrusted with it, to extend it beyond the design for which, and the scope within which, it was intended it should be exercised, to leave the question of its extent to inference."

It is perfectly clear, from the authorities we have cited, that, if the railroad commission had the power to make the order complained of in this case, it must have obtained the same by express legislative grant; and in order to determine this question it is only necessary to look at the source of authority under which the commission must act, and ascertain whether or not the power sought to be exercised in this instance actually existed. It is contended on behalf of the appellee that section 4849 of the Code conferred upon the railroad commission the authority to make the order in question. This section gives the commission power, among other things, to hear and determine

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all complaints made of any time schedule. We do not think that the power to hear and to determine complaints of any time schedule is sufficiently broad to give the railroad commission the authority which it has assumed in this case. In our opinion the authority to determine complaints made of any time schedule, and to make any change deemed proper therein, as provided in said section, conferred upon the commission authority only to regulate the time at which any train should arrive and depart from any regular stopping place, and cannot be so construed as to confer upon the commission the right to compel a railroad company to stop a passenger train at a point other than a regular station.

Upon a reargument of this case it was contended that the commission obtained the authority to make the order in question from the first clause of section 4854 of the Code, which provides that "every railroad shall establish and maintain such depots as shall be reasonably necessary for the public convenience, and shall stop such of its passenger and freight trains at any depot as the business and public convenience shall require;" the contention being that the words "any depot" might include the depot of any other railroad company. However, after a careful consideration of the entire section, we are of the opinion that the legislature had in mind the fact that frequently railroad companies, in disregard of the rights of the public, cause trains, both passenger and freight, to pass without stopping stations along their line, and that this statute conferred upon the railroad commission the authority to compel any railroad company to stop any of its trains, whether passenger or freight, at any depot along its own line; and the contention that the commission has any authority to compel a railroad company to stop its passenger trains at any place other than a regular depot outside of the limits of a city is clearly negatived in that clause of the above section which grants to the railroad commission power "to cause all passenger trains to permit passengers to get on and off in a city at any place other than at the depot,

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where it is for the convenience of the traveling public." It is practically conceded in this case that the commission had no authority to pass the order complained of unless the same was obtained from either one or the other of the two sections referred to. We are therefore of the opinion that neither section 4849 nor 4854 of the code conferred upon the railroad commission authority to make the order appealed from in this case.

We have carefully considered the case of *North Carolina Commission v. Coast Line R. R. Co.*, 137 N. C. 14, 49 S. E. 191, 115 Am. St. Rep. 636, cited by learned counsel for the appellee; but by the laws of the state of North Carolina the railroad commission was given general control and supervision of railroads, and in addition thereto a specific grant of power was given the commission to pass the order complained of in that case, the only question being the power of the legislature to grant the power; while in this case it is not a question of the power of the legislature to grant the power, but as to whether or not the power exercised has ever been granted. We think that the railroad commission should have the authority to require railroad companies to stop their trains at the intersection of another railroad, without regard to whether a regular depot or stopping place is maintained or not, when the public convenience may require it; but this authority must come from the legislative branch of the state government, and not by judicial construction.

We are therefore of the opinion that the railroad commission was without authority to make the order appealed from in this case, and the judgment is accordingly reversed and the cause remanded. *Reversed.*

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Statement of the case.

JOHN R. ANDERSON v. WILEY J. MAXWELL.

[48 South. 227.]

1. EVIDENCE. *Parol to vary writing. Failure to seasonably object. Motion for new trial.*

Objections to the competency of parol testimony as varying the terms of a written instrument cannot be made for the first time in a motion for a new trial.

2. SAME. *Grantor and grantee. Rent reserved by parol.*

Where, in an issue between them touching rents, the grantee in an absolute deed permitted the grantors, without objection to prove by parol that he reserved the right to collect the rents for the current year, maturing after the execution of the deed, he cannot after verdict complain of the incompetency of the testimony.

FROM the circuit court of Lincoln county.

HON. MOYSE H. WILKINSON, Judge.

Anderson, appellant, was plaintiff in the court below; Maxwell, appellee, was defendant there. From a judgment in favor of Maxwell, Anderson appealed to the supreme court.

Maxwell sold his farm to Anderson in April, 1907. After the sale a dispute arose between them as to who should receive the rent of the current year, due in November, 1907, from tenants who leased from Maxwell prior to the sale. Anderson sued out an attachment for rent after it became due against one of the tenants and Maxwell propounded an issue claiming that the rent was due to him and that he as landlord was entitled to the agricultural products distrained. An issue was joined, and in the circuit court Maxwell contended, and Anderson denied, that in the sale of the land Maxwell retained ownership of the rent notes given by the tenants, with the right to collect them when due. This issue was presented to and decided by the jury, the verdict being in favor of Maxwell. After verdict and judgment, Anderson made a motion for a new trial in which he raised,

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Opinion of the court.

for the first time, the question of the competency of parol testimony to show that the rent was reserved or excepted by the grantor, the deed of conveyance being an absolute one on its face.

J. W. Cassedy and *J. A. Naul,* for appellant.

It is a fundamental proposition that rents to accrue follow the title of the leased land; and that to be retained by the vendor of land who sell before the rents are due, the deed of conveyance must expressly provide therefor. *Keesee v. Sloan,* 69 Miss. 369, 11 South. 631; *Watkins v. Duvall,* 69 Miss. 364, 13 South. 727.

P. Z. Jones, for appellee.

On the issue involved in the pleading and under the evidence in the court below, the appellant lost before the jury. After a full and a fair hearing of his contentions, by the jury, and after their determination of his contentions by a verdict adverse to him, he has appealed, and now, for the first time, save in his motion for a new trial, he makes a change of front, and seeks reversal of the judgment on a ground not presented to the jury in the court below. He has waited too long, and this court will not now consider the proposition on which he seeks a reversal.

FLETCHER, J., delivered the opinion of the court.

This case was tried in the circuit court without objection upon testimony and instructions which recognized the regularity of the proceedings and the competency of the testimony. In this court it is sought to challenge the result of the trial upon grounds never suggested until after verdict in the conduct of the case below. We think it is too late to alter the scope of the issue or the course of the pleadings. Appellant must stand upon the record which he made in the circuit court.

Affirmed.

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Statement of the case.

VETURIA V. DURHAM v. SLIDELL COMPANY.

[49 South. 739.]

STATUTE OF FRAUDS. *Business sign. Code* 1906, § 4784. *Trader.*

Proof of one sale does not make the seller a "trader" within the meaning of Code 1906, § 4784, providing that if any person shall transact business, as a trader or otherwise, as agent of another and fail to disclose his principal by a business sign, all property used or acquired in the business shall be liable to his creditors.

FROM the circuit court of Lamar county.

HON. WILLIAM H. COOK, Judge.

The Slidell Company, appellee, a judgment creditor of William L. Durham, appellant's husband, caused an execution to be issued on his judgment and levied upon certain horses and buggies found in a stable belonging to the appellant, Mrs. Durham. The husband, defendant in execution, had the property in his possession and under his control. The plaintiff in execution claimed that it was liable to execution by reason of the statute, Code 1906, § 4784, because her husband was conducting a "livery and feed stable" business, without having a sign on the premises disclosing his principal, etc.

Code, § 4784, is as follows: "If a person shall transact business as a trader or otherwise, with the addition of the words 'agent,' 'factor,' 'and company,' or '& Co.,' or like words, and fail to disclose his principal or partner by a sign in letters easy to be read, placed conspicuously at the house where such business is transacted, or if any person shall transact business in his own name without any such addition, all the property, stock, money and choses in action used or acquired in such business shall, as to the creditors of any such person, be liable for his debts, and be in all respects treated in favor of his creditors as his property."

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Brief for appellant.

Mrs. Durham, appellant, having claimed the property, an issue was made up for trial to determine its liability to levy and sale under the execution.

The testimony is sufficiently shown by the opinion of the court. From a judgment in plaintiff's favor the claimant appealed to the supreme court.

Scott & Parker and *J. A. Alexander,* for appellant.

Under Code 1906, § 4784, the right is given a creditor to take the the property of a third person to settle the debts of the debtor when it is shown by evidence that the property was "used or acquired" in a business transacted by the debtor, as a "trader or otherwise" (which means one *ejusdem generis*), and that such business was transacted by the debtor "in his own name" or a name with the same effect. Even though all the features of the statute have been satisfied and it has been proven that the business was operated in the name of the debtor, and that the nature of such business was that of a "trader," yet the limit of recovery, even in that case, would only extend to that property which the evidence shows was "used or acquired" in transacting such business. There is no evidence in the record to show that the property seized was used or acquired in the business of William L. Durham, or any other business. And until this burden had been carried by the creditor of defendant Durham, it had no right to appropriate the property of Mrs. Durham to the satisfaction of the debt of her husband. The trial court was in error in granting a peremptory instruction to find for the plaintiff in execution, because the plaintiff in execution, appellee here, failed absolutely to carry the burden placed upon it by virtue of the statute, in showing that the property levied upon by the sheriff was used or acquired in the business.

In all the cases decided by this court, construing this statute it is held that three things, or conditions, must exist before the statute can be applied, and they are: (1) That the judgment debtor, transacted business "as a trader or otherwise," (2) that

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Brief for appellee.

the property sought to be subjected to execution, was "used or acquired in the business" of the trader, and (3) that the trader "transacted business in his own name," or in one that had the same effect. *Gumble v. Koon,* 59 Miss. 264; *Quin v. Miles,* 59 Miss. 375; *Shannon v. Blum,* 60 Miss. 828; *Wolf v. Kahn,* 63 Miss. 814; *Loeb v. Morton,* 63 Miss. 280; *Adams v. Berg,* 65 Miss. 3, 3 South. 465; *Evans v. Henley,* 66 Miss. 148, 5 South. 522; *Bank v. Studebaker,* 71 Miss. 544, 14 South. 733; *Meridian Land Co. v. Ormond,* 82 Miss. 758, 35 South. 179; *Dale v. Harrahan,* 85 Miss. 49, 37 South. 458, and others.

William L. Durham was not doing business as a trader or otherwise; if the record shows anything about the nature of the business, it shows that he was running a livery and feed stable business only. The sum total of the evidence as to this is that of the witnesses Shanks and Walker, to the effect that they had hired teams there, and Shanks' statement that he had heard that Durham had sold horses and buggies, which evidence was duly objected to as hearsay. And this hearsay evidence is all the proof that we have of any sale, and that does not designate any time or place, or show that it was in this business. The statute says: "If a person transact business as a trader or otherwise . . . " which latter word "otherwise," has had defined by this court to mean one *ejusdem generis* (*Yale v. Taylor,* 63 Miss. 598), and we submit the legal definition of the "livery and feed stable business" is radically different from a general livery stable business.

C. G. Mayson, J. W. Shanks and *McWillie & Thompson,* for appellee.

The possession of the property levied on was in the defendant in execution; the law presumes him to have been the owner. Possession is *prima facie* evidence of title. *Kitchen v. Brennan,* 53 Miss. 596; Jones on Evidence, § 71.

In case of the trial of the right of property levied upon under execution, plaintiff is entitled to a verdict, when he shows that

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Brief for appellee.

defendant in execution was in possession of the property when levied upon. The burden is then on claimant to establish title. *Ross v. Lawson,* 105 Ala. 351, 16 South. 890.

The defendant in execution was shown to have been operating a public livery stable for some years prior to and at the time of the levy; was shown to have been the sole manager and custodian thereof; and in the absence of a sign disclosing the true ownership of the stable, is conclusively presumed to be the owner thereof and of its contents. *Loeb v. Morton,* 63 Miss. 280; *Paine v. Hall, etc. Co.,* 64 Miss. 175, 1 South. 56; *Hamblet v. Steen,* 65 Miss. 474, 4 South. 431; *Cato v. Hardy,* 1 Miss. Dec. 274.

William L. Durham was in possession of the property when it was levied upon. To make out a *prima facie* case it was only necessary for plaintiff to offer in evidence the original judgment, the execution and the officer's return thereon. Freeman on Ex. § 365. Ib. § 363.

It is claimed by counsel that plaintiff in execution did not make out a *prima facie* case entitling it to recover, because there is no affirmative statement in the return on the writ by the deputy sheriff who made the levy, that the property was levied upon as the property of the defendant in execution, and because the officer as a witness did not testify affirmatively that he took the property from defendant in execution.

To this we respond that the officer could not levy the execution on the property of any person other than the defendant named therein (2 Freeman on Executions (2d ed.) § 254) and consequently every return on an execution showing the seizure of personal property and the taking of it by the officer into his possession necessarily implies that it was levied upon and taken as the property of the defendant in execution, and the implication is just as effectual and strong as would be an affirmative averment in the return to that effect. This is especially true, in a case like the present one, where there is but one defendant in execution. If there were two or more defendants and

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the property did not belong to them jointly it would be advisable no doubt for the return to show to which one of them it belonged, or was levied upon as the property of, but in the absence of such a showing the presumption would be that it belonged to the defendants jointly.

The exact point—the implication arising from a return showing a levy without stating affirmatively to whom the property levied upon belonged—was decided by the supreme court of Illinois in the case of *Hogue v. Corbitt,* 156 Ill. 540, s. c. 41 N. E. 219 and by our own supreme court in *Saunders v. Columbus, etc., Co.,* 43 Miss. 583.

As is shown by abundant authority the return of the officer on the execution, within the requirements of the law, is, as against strangers to the writ *prima facie* evidence of the facts stated, and until vacated is conclusive against the parties to the execution. 2 Freeman on Executions (2d ed.) § 365, and authorities cited. Of course what the return shows by necessary implication is as effectually shown as if affirmatively stated therein; and it is just as conclusive on the parties to the execution and just as much *prima facie* evidence against strangers to the writ.

Argued orally by *W. L. Scott,* for appellant and by *R. H. Thompson,* for appellee.

WHITFIELD, C. J., delivered the opinion of the court.

A most careful scrutiny of the testimony in this record fails to show that William L. Durham was a "trader," within the meaning of our sign statute. Section 4784 of the Code of 1906. The evidence, taken as a whole, shows that the stable he kept was a livery and feed stable, rather than a livery and sales stable. There is no competent evidence of any sale made by him, except of one vehicle. There is certain other testimony about sales; but that testimony is wholly hearsay, and, of course, incompetent. "One swallow does not make a summer," nor one

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Statement of the case.

sale a trader. There is also some meager testimony about hiring teams. The very bill head, introduced by the plaintiff in execution as tending to show that William L. Durham had a sign showing that he was doing business in his own name, expressly recites that it was a "livery and feed stable," and besides, this bill head was simply one of many loose bill heads found in the office on the desk, and it is not at all certain from the testimony that it may not have been a bill head used by William L. Durham when he was conducting a livery stable in his own name, some time before this. There was no sign about the place anywhere, and this bill head amounts to nothing, on the testimony in this case, and tends to show, if anything, that the stable was a livery and feed stable.

On the whole testimony, it was plainly error for the court to give the peremptory instruction, as it did, to find for the plaintiff in execution. The case should have gone to the jury.

Reversed and remanded.

JAMES S. JARVIS v. DELLA ARMSTRONG ET AL.

[48 South. 1.]

HOMESTEADS. *Purchase money. Cost of erecting dwelling house. Husband and wife. Mortgages. Code* 1906, § 2159.

Although Code 1906, § 2159, provides that a husband's conveyance or incumbrance of his homestead shall not be valid unless signed by his wife, a mortgage, executed alone by the husband, to secure the unpaid purchase money for the land and the contract price for erecting the dwelling house constituting the homestead is valid.

FROM the chancery court of Union county.

HON. JOHN Q. ROBINS, Chancellor.

Mrs. Armstrong and others, appellees, were complainants in

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the court below; Jarvis, the appellant, was defendant there. From a decree in complainants' favor, dismissing defendant's cross-bill the defendant appealed to the supreme court. The opinion of the court states the facts.

Stephens & Stephens, for appellant.

By virtue of our statute law giving mechanics and material men a lien, there was a valid lien upon the property in controversy. That such lien is superior to any rights which the wife had in the homestead, is well settled. The homestead exemption cannot be claimed as against valid liens which have attached to the premises before they are impressed with the character of a homestead, whether such liens are obtained by contract or by operation of law. 15 Am. & Eng. Ency. Law (2d ed.), 617.

Where a vendor of lands retains the title as security for the unpaid purchase money, the superiority of this lien over the right of dower of the wife to the vendee is clear and well established. 1 Scribner on Dower, 555.

Code 1906, § 2156, says: "Nor shall any property be exempt from sale . . . for any labor done thereon, or material furnished therefor." See *Mitchner v. Robbins,* 73 Miss. 383, 19 South. 103.

It has been held by different states, having homestead laws similar to ours, that a mortgage which is given for the purpose of obtaining funds or material to make improvements on the homestead, is not within the rule requiring the consent or joinder of the wife of the homesteader. *Hoffman v. Mill,* 47 Kan., 611; *Thacker v. Booth,* 6 S. W. 460; *Fournier v. Chisholm,* 45 Mich. 417; 15 Am. & Eng. Ency. Law (2d ed.), 674; *Dillon v. Kaufman,* 58 Tex. 696.

The appellant paid to the contractor the full amount due for the building, as he had agreed and contracted to do before the contractor ever did any work whatever on the building. The payments were made from time to time by appellant as the

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Brief for appellant.

work progressed. The contractor knew that Armstrong had no funds and so it was agreed among all three of them that Jarvis should guarantee to the contractor the payment of the price due by Armstrong to the contractor for the work to be done. And with this clear understanding, the work was done by the contractor. In view of these facts and of the further fact that Jarvis carried out the contract in so far as he was obligated thereunder, and paid every dollar of the amount guaranteed, it must follow that he is entitled to be subrogated to the lien which the contractor, Reed, had against the property. Subrogation is the substitution of another person in place of a claimant to whose rights he succeeds in relation to the claim; and the subrogation may be either legal or conventional. Legal subrogation is allowed only in cases where the person advancing money to pay the debt of another stands in the position of a surety or is compelled to pay the debt to protect his own rights. Conventional subrogation results from an agreement, made either with the debtor or the creditor, that the person paying shall be substituted into the rights of the creditor whose claim is thus settled. Subrogation is a creature of equity, the purpose of which is to advance justice. *Johnson v. Barrett,* 19 N. E. 199; *Payne v. Hathaway,* 3 Vt. 212; *Re McGuire,* 137 Fed. 967; *Robinson v. Leavitt,* 7 N. H. 99.

What will best promote the advancement of justice in this case? Jarvis, at the request of Armstrong, became surety for him. This was agreed on before the work was done, and, in fact, before the contract therefor was made with Reed, the contractor. Jarvis paid the entire contract price. The claim of Jarvis placed no greater burden upon the property than existed before, Armstrong being indebted to Jarvis instead of to the contractor. It was certainly the intent of all parties that Jarvis should make his money, if necessary, out of the house built with the money he had advanced. Beach, Mod. Eq. 457.

Where a surety pays for his principal, he need not, to entitle him to the right of subrogation, at the time of payment, signify

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his election and acceptance of such right; but it is sufficient if he show suretyship, payment by him of the debt, and a lien held by the creditor whose claim has been settled by his payment. *Watts v. Eufala Bank,* 76 Ala. 474; *Davison v. Gregory,* 43 S. E. 916; *York v. Landis,* 65 N. C. 535; *Holden v. Strickland,* 116 N. C. 185; *Carter v. Jones,* 40 N. C. 196; *Straman v. Rechtine,* 58 Ohio, 455; *Liverman v. Lee,* 86 Miss. 370, 38 South. 658; Freeman on Void Jud. Sales, 51; *Davis v. Gaines,* 104 U. S. 386.

The fact that the contract with reference to the building of the house was a verbal one does not change the situation. Even if it be contended, because of the contract's being verbal, that Jarvis was under no legal obligation to pay the contractor for building the house, yet Jarvis did make the payment. Although Jarvis might successfully have defended a suit brought against him by the contractor for the purchase money, this would have been a personal matter relating solely to Jarvis, and cannot be set up by appellees against Jarvis now. *Gresham v. Lutrick,* 76 Miss. 444, 24 South. 169; Brown on Statute of Frauds, 136; 8 Am. & Eng. Ency. Law (1st ed.), 658; *Insurance Trust Co. v. Thomas,* 53 Pac. 472; *Voltz v. Bank,* 30 L. R. A. 155.

The chancellor of the court below, in rendering the decision in this case against appellant, stated in effect that the contention made by Jarvis with reference to the right of subrogation was correct; but he held that because the time for enforcing the mechanic's lien had expired before the filing of the cross-bill, Jarvis was barred by statute of limitation and there was nothing for him to be subrogated to. Now, the period during which one interested may take advantage of the mechanic's lien law, is twelve months. The debt was paid by Jarvis within that period; and the deed of trust was given within three months from the completion of the building contract. If subrogation can ever arise by operation of law, Jarvis' right thereto was complete when the payment of the debt was made by him.

The signature of the wife was not necessary to the validity

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of the deed of trust. When a valid lien once attaches, the husband may renew the lien, and the signature of the wife is unnecessary. *Smith v. Scherck,* 60 Miss. 491; *Hembrick v. Jones,* 64 Miss. 240; *Black v. Reno,* 59 Fed. 917.

May, Flowers & Whitfield, on the same side.

It will be noted that the appellant is not asking the court to enforce the lien which Reed, the contractor, might have enforced, namely, the mechanic's lien. What is earnestly sought by appellant is that his equitable rights in the property be held superior to the homestead rights claimed by the appellees. The appellant's rights, claimed by appellant to be superior to those of appellees, arise out of his payment of the entire purchase price of the building claimed as part of the homestead.

A husband alone can execute a valid conveyance of his homestead to secure its purchase money. *Billingsley v. Neblett,* 56 Miss. 537; *North American Trust Co. v. Lanier,* 78 Miss. 418, 28 South. 804. A careful reading of these two cases must result in the conclusion that this court recognizes the principles that homestead rights do not vest until the homestead is paid for, as against persons who furnish the money with which the homestead property is purchased or homestead dwelling is built. One must pay for his property before it shall belong to him, is the view of equity.

Every dollar paid out for the construction of the homestead dwelling house was paid by Jarvis. At the time he paid it, it is unquestionable that the man who did the work on the house and furnished the material therefor had a valid and enforceable lien. Such lien was assignable. *Kerr v. Moore,* 54 Miss. 286. Jarvis could have had the debt transferred to him by the contractor, with its accompanying lien, and have at once enforced the lien and collected the debt by recourse against the property. While this lien was in force, the new arrangement was made by which an extension was allowed to Armstrong, and he executed a deed of trust on all of the property which Jarvis had paid for,

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Brief for appellees.

and had the deed of trust recite that it was to secure purchase money. Certainly the appellees cannot now be heard by a court of equity to say, with any advantage to themselves, that while appellant was trying to accommodate their husband and father and themselves, they entrapped him; that while he, as a favor, extended the time for payment and took another kind of security, his action caused appellees to get their property for nothing. This would be inequitable and unconscionable. 15 Am. & Eng. Ency. Law (2d ed.), 674.

LeRoy Kennedy, for appellees.

A surety or guarantor has no right to a mechanic's lien on the house of his principal for materials furnished or work done for the party to whom he makes the guaranty. Boisot on Mechanic's Liens, § 263; *Ruggles v. Blank,* 15 Ill. App. 436. However, the question of mechanic's lien for labor and material does not arise in this case, as the contract of the parties eliminated it.

A lien on property which originally existed in favor of a contractor or mechanic and which has been abandoned by him cannot be extended or restored to life by tacking on a new lien arising under another contract subsequently made with the owner of the property. *Ehlers v. Elder,* 51 Miss. 495; Boisot on Mech. Lien, § 721; 79 Me. 282, 9 Atl. 725.

It is evident that appellant elected to secure his debt in a manner suitable to himself, and that to this end he carved out his security in the shape of a deed of trust upon the identical property upon which the mechanic's lien formerly attached. This was a clear waiver of his mechanic's lien. *Trullingher's case,* 33 Am. Rep. 708. Appellant's claim upon the homestead is, then, only what is evidenced by the deed of trust. He gave up any other lien on accepting the deed of trust. If the deed of trust be invalid he can have no claim whatever upon the homestead. And a mere glance at the deed of trust shows that the instrument does not bear the signature of Armstrong's wife.

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Brief for appellees.

Certainly it needs no citation of authority to substantiate the claim that a deed of trust upon the homestead property, executed only by the husband, to secure his personal indebtedness, and lacking the signature of the wife, is void in so far as claim thereunder upon the homestead property is concerned. It is true that the title-deed to the homestead property was in the name of the husband, Armstrong, at the time he executed the deed of trust, and that he, instead of his wife, was the owner of the property. But a homestead belongs to the family; and the law contemplates the concurrence of the two heads of the family, husband and wife, in the conveyance before the title of the homestead shall pass to any third person. *McPhee's case,* 3 Am. St. Rep. 581.

Jarvis can have no claim upon the dwelling house because of any subrogation of himself to the formerly existing lien of Reed, the contractor; for, instead of enforcing the lien, even if he had such right by his payment of the indebtedness to Reed, he ignored the lien entirely, and sat down and waited for two years during which time he relied upon the lien of the deed of trust which he had gotten from Armstrong. Why did he not take an assignment of the lien from the contractor when he paid him?

The doctrine of subrogation might have been invoked by appellant against Armstrong or against the appellees, within the year's time allowed for enforcement of such lien. But the statute law of our state in regard to mechanic's and material men's liens does not allow a lienor to recline upon green hills and sit complacently by still waters indefinitely or until his rights have become dissolved by lapse of time, and then further permit him to arise and enter the temple of justice and have himself reinstated in these rights. Such procedure would be placing a premium upon one's inattention to business. One who seeks the benefit of a mechanic's lien must pursue the statute affording the remedy, and if, after the work is done, the time be extended by the taking of a note, the suit thereon must be instituted within the twelve months' period fixed by the statute.

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Dinkins v. Bowers, 49 Miss. 219; *Ehlers v. Elder,* 51 Miss. 495.

What better or superior claim does the husband's deed of trust impose upon the homestead in this case than would any other or ordinary deed of trust? Appellant contends that he should be subrogated to the rights of Reed, the contractor. But Reed had no rights, when this suit was instituted, for the twelve months' period had expired. *Partee v. Matthews,* 53 Miss. 140.

Argued orally by *J. N. Flowers,* for appellant.

HARPER, Special Judge, delivered the opinion of the court.*

In June, 1904, one J. H. Armstrong purchased certain lots in the town of New Albany, Miss., for which he agreed to pay $800, paying $25 cash and giving his notes for the remainder. He was unable to meet these notes as they fell due, and at Armstrong's request they were taken up by appellant, Jarvis. Later Armstrong decided to build a house on these lots, and contracted with one Reed to construct the same; but, as he had no money, it was agreed between Armstrong and Reed and appellant, Jarvis, that Jarvis would guarantee the payments therefor as they fell due, and in accordance with said agreement Jarvis did pay for the construction of the house for Armstrong. About January 1, 1905, Armstrong and his family moved into and occupied the house. While so occupying it, in April, 1905, Armstrong executed a deed of trust to secure Jarvis for the sum he had advanced to pay off the notes due on the lots and the amount paid out by Jarvis to Reed for constructing the house. This deed of trust recites that it was for the purchase money of the house and lot; but the wife, Mrs. Della Armstrong, did not join in this deed of trust. Some time afterwards Armstrong died, and Mrs. Della Armstrong and his children filed this bill

* FLETCHER, J., being disqualified in the case, recused himself and Wm. R. Harper, Esq., a member of the supreme court bar was appointed and presided in his place.

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Opinion of the court.

to cancel the deed of trust as a cloud upon their title. Whereupon the defendant, Jarvis, answered, setting up the foregoing facts, and, making his answer a cross-bill, asked a foreclosure of his mortgage. To this the appellees, Mrs. Armstrong and her children, demurred specially. The demurrer was sustained as to so much of the demand as arose out of the payment for building the house, and was overruled as to that part of the demand that arose from the payment of the notes for the purchase money of the lots, from which ruling the cross-complainant, Jarvis, appealed to this court.

It has been repeatedly held by this court that a deed of trust given to secure the purchase money of a homestead is valid without the signature of the wife. If that be true, we can see no good or sufficient reason why the same rule should not equally apply as to money advanced to build the very house converted into a homestead. The money, while it may not be technically purchase money, creates and brings into existence the very thing that becomes the homestead. Every reason advanced for the protection of the purchase money as against a homestead right applies with equal force and effect to money used to construct the house; that is, to create and bring into existence the very subject claimed as a homestead. Until such claims are satisfied, homestead rights cannot attach as against them.

The decree of the lower court is reversed, and the cause is remanded, to be proceeded with in accordance with this opinion.

Reversed.

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Brief for appellant.

HENRY T. TUBBERVILLE v. HENRY F. SIMPSON.

[47 South. 784.]

1. CHATTEL MORTGAGES. *Promissory note. Attorney's fees. Purchaser of encumbered chattels.*

Where a promissory note, stipulating for the payment of an additional sum as an attorney's fee in case of its being placed in the hands of an attorney for collection, was secured by a recorded chattel mortgage, a purchaser of the chattels from the mortgagors acquires them subject to a lien securing the attorney's fee as well as the original fee, although the recitals of the mortgage descriptive of the note do not mention any promise to pay an attorney's fee.

2. DEEDS OF TRUST. *Trustee's fees. Attorney's fees.*

Where a note promising to pay an attorney's fee in case it is placed in the hands of an attorney for collection is secured by a deed of trust, it is proper to charge a fee on sums collected by an attorney before sale under the deed and on sums collected by him after litigation, but not on sums collected by the sale efforts of the trustee, to whom trustee's charges were paid, although turned over to the attorney.

FROM the circuit court of Marshall county.

HON. WILLIAM A. ROANE, Judge.

Simpson, the appellee, was plaintiff in the court below; Tubberville, appellant, was defendant there. From a judgment in plaintiff's favor the defendant appealed to the supreme court. The opinion of the court states the facts.

Smith & Totten, for appellant.

One of the instructions, granted in behalf of the appellee, instructed the jury peremptorily to find for appellee as to the balance of principal due and as to interest and as to attorney's fees called for in the notes in evidence. This instruction was erroneous, because the provision in the notes for attorney's fees is not set forth in the recorded deed of trust. The language

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Brief for appellee.

of this recorded instrument, with regard to appropriation of proceeds after foreclosure, reads as follows: "The proceeds of sale shall be applied, first, to the expenses of executing this trust, including the cost of seizing and caring for said property and preparing it for sale; next, to the discharge of any indebtedness which may be due and owing to said third party (*cestui que trust*); and the surplus over shall be paid to the party of the first part (mortgagor) or his assigns." Certainly Tubberville, as purchaser, could have no notice, from the mere record of this instrument, that there was any indebtedness due or to become due to the mortgagee on account of attorney's fees. There is a conflict between the provisions of the notes and the provisions of the deed of trust as to attorney's fees, since the notes provided for attorney's fees and the deed of trust did not upon its face. And therefore the provisions of the deed of trust must govern in preference to the provisions of the notes, as regards an innocent third party like appellee. *Thompkins v. Drenning,* 95 Ala. 463; 28 Am. & Eng. Ency. Law (2d ed.), 831.

Certainly it was not within the comtemplation of the mortgagor to incur both attorney's fees and trustee's fees in the foreclosure of the deed of trust. We do not mean to say that, in a proper case, attorney's fees may not be allowed in addition to a trustee's compensation. But certainly, as a general rule, provisions as to attorney's fees in contractual matters must be most strictly construed, and in cases of doubt must be resolved in favor of the debtor. *Elkin v. Rives,* 82 Miss. 744, 35 South. 200.

S. A. Morrison, for appellee.

The deed of trust, of record, gave constructive notice to appellant of its existence, and, inasmuch as it contained reference to the notes, put the appellant, as purchaser of the incumbered property, upon inquiry as to the terms and provisions of the notes. Furthermore, Tubberville, the appellant, had seen all of

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the papers before he bought the incumbered property, and hence cannot claim that he was a *bona fide* purchaser without notice.

That attorney's fees, called for in promissory notes, may be collected in due course from the property securing the principal and interest of the notes can hardly now be questioned in the light of our numerous decisions on the subject. *Meacham v. Pinson,* 60 Miss. 217; *Eyrich v. Bank,* 67 Miss. 60, 6 South. 615; *Brahan v. Bank,* 72 Miss. 266, 16 South. 203.

It will be noted that the attorney's fees were for payment of arduous duties performed by reputable attorneys.

FLETCHER, J., delivered the opinion of the court.

On November 16, 1905, one J. F. Milam, being indebted to Shelley Guy in the sum of $1,675, executed three promissory notes, payable at intervals, aggregating the amount of the indebtedness, each of which notes provided that, "if this note is placed in the hands of an attorney for collection, the makers and indorsers hereof agree to pay the holder thereof an attorney's fee of ten per cent. upon the amount due." To secure these notes Milam executed a deed of trust on ten mules, a log wagon, and certain implements used in hauling logs. This trust deed does not recite in so many words that the notes provide for the payment of attorney's fees, but it does contain the usual provision as to expenses of executing the trust and the cost of seizing and caring for the property and preparing it for sale. Default was made in the payment of the notes, and they were placed in the hands of an attorney for collection. About the time or a little after the second note became due Milam sold to Tubberville four of the mules, the wagon and certain of the appliances, all embraced in the deed of trust. The trust deed having been promptly recorded, Tubberville had constructive notice of its existence, and seems also to have had actual notice that the property was incumbered. We cannot tell from this record whether Tubberville actually knew of the provision in the notes as to attorney's fees, but he did know that the notes were

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in the attorney's hands for collection. Milam paid $250 on the debt, and Tubberville $600; the latter sum being paid to the attorney, who deducted ten per cent. for collection and credited the notes with the balance. Subsequently Simpson, the trustee, took charge of and sold at public sale the mules covered by the trust deed, but not sold to Tubberville, and derived the sum of $925 from this sale. From this sum there were deducted trustee's expenses and commissions, the sum of $100, which Guy had been forced to pay to discharge a superior lien (this right being conferred by the trust deed), and ten per cent. attorney's fees, amounting to $92. These payments not being sufficient to discharge the indebtedness, the trustee attempted to take charge of the property held by Tubberville, and, meeting with resistence, instituted this action of replevin to secure possession of the property. On this trial the court charged the jury to find for the plaintiff in such sum as might be found due, allowing plaintiff the attorney's fees that had been retained. The only real controversy is over this question of attorney's fees; the question of trustee's charges, expenses, and commissions having been settled by the jury on proper instructions.

It is urged that Tubberville, the purchaser, should not be charged with the payment of attorney's fees, because the trust deed did not contain any reference to such fees, and the record did not, therefore, impart notice of this phase of the contract. It might be a sufficient answer to this contention to say that Tubberville has not affirmatively shown that he was a *bona fide* purchaser without notice. He testified in the case, admitted that he knew the property was under mortgage, and disclosed nothing as to the source of his information. It might well have been true that he derived his information from Milam, who gave full particulars of the contract. But, aside from this, we think it the safer view that the trust deed, containing a reference to the notes, puts a purchaser upon inquiry as to the contents of the notes, especially in regard to so usual a provision as the payment of attorney's fees. We think the case falls within the

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principles, though not within the facts, of *Witczinski et al. v. Everman,* 51 Miss. 841.

The other contention deals with the propriety of allowing both trustee's charges and attorney's fees. In regard to the $600 collected by the attorney before the sale of any of the property, this sum was not diminished by trustee's expenses or commissions, and, having been collected through the efforts of the attorney, the allowance of the fee was obviously correct. Coming, now, to the other amount awarded by the jury in this suit, it is clear that the attorney's fees should have been allowed thereon, since the sum was collected only after a stubborn litigation, in which the services of an attorney were indispensable. But in the case of the money derived from the sale of certain property by the trustee, in which the sum of $925 was realized, a different question is presented. There was no litigation in regard to this sale, and the sum collected was due entirely to the efforts of the trustee, as to which the attorney had nothing to do, except to give general directions to the trustee to seize and sell the property. Manifestly the attorney and the trustee each had his own peculiar functions to perform. Each occupied a separate and somewhat distinct field of operations. Each should be compensated for such services as he renders within his own peculiar sphere, but justice will not permit the attorney to retain fees from money collected by the trustee as the fruits of a sale made by the trustee and which has already been charged with the payments of all reasonable trustee's charges. Stipulations for the payment of attorney's fees must be construed strictly in favor of the debtor; and, so construing this contract, we cannot approve the allowance of this item. This conclusion is clearly foreshadowed in the case of *Elkin v. Rives,* 82 Miss. 744, 35 South. 200, approving the Alabama case of *Thompkins v. Drennan,* 10 South. 638, in which the distinct functions of attorney and trustee are clearly defined.

The verdict of the jury under the instructions of the court manifestly allowed the $92 item claimed by the attorney, and

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to this extent the judgment is erroneous. If appellee will remit that amount here, the judgment will be affirmed; otherwise, it is reversed and the cause remanded.

Error.

NIAGARA INSURANCE COMPANY v. WARREN-GEE LUMBER COMPANY.

[47 South. 551.]

FIRE INSURANCE. *Right to relief. Delivery of policy. Bill in equity. Discovery. Demurrer.*

Actual delivery of a fire insurance policy into the hands of the insured is not essential to the validity of a contract of insurance, hence, a bill in equity against an insurance agent of several companies and one of his companies, charging that upon complainant's applying to the agent for additional fire insurance he telegraphed the application to one of his companies, believed to be the defendant company, and confirmed his telegram by letter, and that the company accepted the application, thereby completing the contract, and mailed a policy to the agent for delivery to complainant before the property was burned; that since the fire complainant had tendered the premium but the agent refused to accept it, to deliver the policy and to disclose by which of his companies it was written, discovery and appropriate relief being prayed, is not demurrable.

FROM the chancery court of Jackson county.

HON. THADDEUS A. WOOD, Chancellor.

The Warren-Gee Lumber Company, the appellee, was complainant in the court below, and the Niagara Insurance Company, the appellant, and one Gaston, were defendants there. From a decree overruling the insurance company's demurrer to the bill it appealed to the supreme court.

The complainant lumber company applied to one Gaston, a local agent of the insurance company through whom other fire insurance had been written upon complainant's mill property,

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for additional fire insurance. Gaston thereupon telegraphed to defendant company's manager as follows: "Have bound $5,000 on mill and lumber," and confirmed the telegram by a letter, which fully identified the complainant as the insurer and the destroyed property as its subject matter, and further stating: "I wired you this morning, 'Have bound $5,000 on mill and lumber,' which I now beg to confirm. In giving the increase, we changed the schedule to an additional $3,000 on the planing mill machinery and $2,000 on the lumber and stock, which now gives $5,450 on the planing mill machinery and $5,000 on the stock of lumber. I will be very glad to see you before you return home, and if you will likely be here please advise me, in order that I can do so." Before the policy evidencing such insurance had been delivered or the premium paid, the property was destroyed by fire. Gaston then refused to deliver a policy, which had reached him, or to disclose in what company he had written the insurance, although the premium was tendered him by complainant. Gaston was, at the time, and had been for a long time continuously before, the general agent of a large number of fire insurance companies, among them the appellant company. The complainant charged that $2,000 of the alleged insurance had been placed with and accepted by defendant company, and prayed discovery and that the insurance company should be required to deliver to complainant a proper policy and for a personal decree for $2,000 against it, and in case it was ascertained that Gaston had failed or refused to obtain the insurance as agreed, then for a personal decree against him. To the bill the Niagara Insurance Company demurred on the ground that it did not show a contract of insurance.

Denny & Denny, for appellant.

The bill fails to disclose the subject matter of the insurance as to which appellant is sought to be held liable. The bill does not state that appellant issued insurance upon the mill or the lumber, nor does it state the amount of insurance on the mill

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and the amount on the lumber. Certainly, if appellant be required to answer the bill, it should be advised by the allegations of the bill whether it is sought to be held liable for the mill or for the lumber, or both.

The authorities agree that, before a contract of insurance is binding, all of the essential elements of the contract must be understood and be mutually assented to by the parties concerned. A mere expression of a desire by one intending to procure insurance, that he wished insurance, and an assent by the insurance agent, without anything further done would hardly amount to a contract of insurance or a valid agreement to insure. The subject matter, period and rate and amount of insurance, and other elements would necessarily have to be considered and be agreed upon. *Commercial Fire Ins. Co. v. Morris,* 105 Ala. 498, 18 South. 34; *German Ins. Co. v. Downan,* 115 Fed. 481.

Appellee's bill states the conclusion of the pleader that appellee's agent intended and appellant's agent knew that the provisions of complete contracts made in their former dealings should be incorporated in the agreement alleged in the bill. But there is no fact stated showing such to be the case. Telepathy could hardly advise of the intent, purpose or desire in the minds of the two parties relative to the insurance at the specific time when appellee's agent simply applied for insurance and appellant's agent replied that he had bound same, without any mention of former dealings.

It is clear from the allegations of the bill that appellee reserved the right to reject the policy to be issued if the same should be issued by a company deemed by appellee to be otherwise than reputable. Hence the contract was not complete. *New York Life Ins. Co. v. Babcock,* 69 Am. St. Rep. 137, 144; *Alabama Gold Life Ins. Co. v. Mayes,* 61 Ala. 163; *Kimball v. Lion Ins. Co.,* 17 Fed. 625; *Western Assurance Co. v. McAlpin* (Ind.), 77 Am. St. Rep. 423; *Johnson v. Connecticut Ins. Co.,* 84 Ky. 470.

When a completed oral contract is made with the agent of a

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certain fire insurance company to acquire fire insurance in such company, delivery of the policy is not essential to render the company liable for loss of the insured property by fire. But when, as in the case at bar, one deals with an agent of a number of fire insurance companies and requests fire insurance, and does not specify or agree which one of the different companies shall insure, then there is not a completed contract of insurance with any one certain company represented by the agent unless there is an issuance and actual delivery to the assured of a policy or notice from the agent that he has placed the insurance and has issued the policy.

Green & Green, on the same side.

No contract of insurance was ever consummated, because the minds of the parties never met. *Insurance Co. v. Downman,* 115 Fed. 482; *Insurance Co. v. Graham,* 181 Ill. 160; *Insurance Co. v. Trimble,* 78 S. W. 465; *Kimball v. Insurance Co.,* 17 Fed. 625; *Kleis v. Insurance Co.,* 117 Mich. 469; *Insurance Co. v. Whitman,* 75 Ohio St. 321; *Church v. Insurance Co.,* 23 N. Y. 161; *Worth v. Insurance Co.,* 64 Mo. App. 587; *Clarke v. Brand,* 62 Ga. 24.

This suit is for specific performance, and it is requisite that any agreement between the parties should be certain and mutual. *Aston v. Robinson,* 49 Miss. 346; *Everman v. Herndon,* 71 Miss. 823, 15 South. 135; *Welch v. Williams,* 85 Miss. 303, 37 South. 561.

The date at which the alleged insurance was to take effect is not specified in the bill, and it is questionable for what period insurance should continue. The terms of insurance are thus too vague and general, if it be conceded that any insurance ever existed. *Insurance Co. v. McIntosh,* 86 Miss. 236, 38 South. 775; *Equitable Insurance Co. v. McElroy,* 83 Fed. 643; *Insurance Co. v. Schutze,* 80 Fed. 337; *Trask v. Insurance Co.,* 58 Mo. App. 431; *Hamblett v. Insurance Co.,* 36 Fed. 118.

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Ford, White & Ford, for appellee.

The appellee's bill in this case is supported by authority. *Taylor v. Merchants' Fire Insurance Co.,* 9 How. (U. S.) 391; *Commercial, etc., Co. v. Union, etc., Co.,* 19 How. (U. S.) 318; *Eames v. Home Insurance Co.,* 94 U. S. 621, all hold that where there is a contract for insurance which has not been fully executed by the issuance of a policy, equity has jurisdiction to enforce specifically the contract, and to require payment of the stipulated amount if loss occurs before issuance of the written policy.

The letter written by Gaston, appellant's agent, shows that there was a valid contract of insurance. His letter called for no answer. The circumstances show a full and definite proposition or application by appellee, and an unqualified and unconditional acceptance by appellant.

It is immaterial whether the insurance sued for was on the mill-plant or on the lumber. Appellee's bill asks discovery as to this.

The action of the court below in overruling the demurrer was manifestly correct.

MAYES, J., delivered the opinion of the court.

It is our judgment that a demurrer in this case has no place. It is eminently a case where an answer is required and should have been made. The action of the court in overruling the demurrer was correct, and the decree appealed from is therefore affirmed and the cause remanded. *Affirmed.*

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Brief for appellee.

DAVID M. CAMPBELL v. WILLIAM H. DAVIS ET AL.

[47 South. 546.]

1. EVIDENCE. *Written contracts. Parol to show consideration.*

The real consideration for a promissory note and deed of trust securing it, as distinguished from the expressed consideration, may be shown by parol in a suit between the parties to enjoin a foreclosure sale *in pais* under the deed.

2. PAYMENTS. *Sunday.*

The court will not deny a debtor credit for a payment, accepted and retained by the creditor, because made on Sunday.

FROM the chancery court of Kemper county.

HON. JAMES F. McCOOL, Chancellor.

Davis and wife, appellees, were complainants in the court below; Campbell, the appellant, the beneficiary, and another, the trustee, in a deed of trust executed by appellees, were defendants there. From a decree in favor of complainants the defendant, Campbell, appealed to the supreme court.

Appellees obtained an injunction to prevent a foreclosure sale under a deed of trust executed by appellees to secure an indebtedness due to the appellant. The deed of trust recited the indebtedness to be $700, for money and supplies advanced and that it was evidenced by a note for that sum. The testimony of Davis was that Campbell advanced him only $200, but took the note for $700 and had the deed of trust recite an indebtedness for that sum so that he might, if necessary, use the note secured by the deed of trust, as collateral in securing an advancement from banks and other money lenders; and that he had paid the $200, in different instalments, several of which were made on Sunday, and accepted by Campbell without objection. The appellant objected to Davis' testimony as to the amount due on the ground that it was an attempt to vary the terms of the note and deed of trust; and objected to credits for money paid on Sunday, be-

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Brief for appellant.

cause made in violation of Code 1906, § 1366, rendering Sunday contracts and business transactions invalid.

George H. Ethridge, for appellant.

It was not legally permissible for the appellee to show payments made on Sunday. Code 1906, § 1366, distinctly provides that "if any person, on the first day of the week, commonly called Sunday, shall himself labor at his own or any other trade, calling or business, or shall employ his apprentice or servant in labor or other business, except it be in the ordinary household offices of daily necessity or other work of necessity or charity, he shall on conviction be fined," etc. The language of the statute is very broad and comprehensive. If, then, the payment of a debt is a business transaction, it cannot be done legally on Sunday, and our courts can have no authority to enforce such payment or apply the same to the reduction of the debt. He who comes into equity must come with clean hands. Eaton on Equity, 69.

The word, "business," embraces every thing about which a person can be employed. *Netterville v. Barber,* 52 Miss. 169.

The court will take notice that the fact of payment being made at all is denied by appellant, hence appellant cannot be criticised on the ground of his taking the Sabbath to attend to his business.

The court below erred in permitting the appellee to show by parol that the note and deed of trust did not correctly recite the amount of indebtedness. When the agreement of parties is reduced to writing, the writing becomes the exponent of the contract, and previous conversations and agreements are merged into such writing; and the terms of the writing cannot legally be enlarged or diminished or varied by parol. *O'Neal v. McLeod,* 28 South. 23; *Herndon v. Henderson,* 41 Miss. 584; *Baum v. Lynn,* 72 Miss. 932; *Field v. Stewart,* 28 South. 819; *Williams v. Phillips,* 51 Miss. 196; *Bell v. State,* 38 South. 795; *Scott v. State,* 39 South. 1012.

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Rencher & Daws, for appellees.

Code 1906, § 1366, cited by learned counsel for appellant, is highly penal and should be strictly construed. Before a transaction should be condemned under the statute it should appear that the transaction comes within the spirit as well as the letter of the statute. The record shows that appellant Campbell went to the home of Davis, the appellee, on Sunday, received the money and assured Davis that the matter was all right. Can a creditor, on the Sabbath day, receive a payment on indebtedness, accept the same for such purpose, retain such payment, and then be allowed to enforce payment again on the sole ground that the debtor had no legal obligation upon him to make the payment on the Sabbath?

A payment made on Sunday, if retained by the payee, is a valid payment. Smith on Personal Property, 198; *Johnson v. Willis,* 7 Gray (Mass.), 164; *Lamore v. Frisbie,* 42 Mich. 186; *Blakesley v. Johnson,* 13 Wis. 530; *Berry v. Planters' Bank,* 3 Tenn. Ch. 69; 27 Am. & Eng. Ency. Law (2d ed.), 408.

Parol evidence of the amount actually due under the note and deed of trust was allowable. The true amount of indebtedness is what the court will seek to ascertain, and not to settle the question of the terms of the deed of trust. The record shows that the note, secured by the deed of trust, was given for much more than twice the amount actually due. It clearly appears that Campbell wanted security for more than was due, so that he might deposit the paper with his bank and draw more money upon it as collateral than he could hope to do if the true indebtedness were shown. This of itself was a fraud upon Campbell's part, and oral evidence is competent, under the circumstances, to show the true consideration. *Cocke v. Blackbourn,* 57 Miss. 689; *McDonald v. Kamper,* 89 Miss. 221, 42 South. 877; *Pollen v. James,* 45 Miss. 129; *Baum v. Lynn,* 18 South. 428.

FLETCHER, J., delivered the opinion of the court.

The contention, earnestly argued, that the chancellor erred

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in permitting the complainant to show by parol that the note and deed of trust did not correctly recite the amount of the debt, but a sum far in excess of the true indebtedness, must fail in the light of the explanation given by Davis, and which was accepted by the chancellor as true. This statement was that only $200 was owing, but that at Campbell's request the amount was stated as $700, in order that Campbell might use the paper as collateral. This brings the case squarely within the well-established rule thus admirably stated by Judge CAMPBELL: "The terms of an obligation, assumed to be valid, cannot be varied by parol; but it may be shown by parol what caused the party to thus oblige himself. That consists with the written obligation, and does not vary it. The right to show the real consideration is a qualification of the general rule of the admissibility of parol evidence to alter the terms of a written contract, and is as well established as the rule itself. What I bind myself by writing to do cannot be varied by parol; but I may always show by parol what induced me to thus bind myself, and thereby test the question whether I was legally bound, as the writing imports, or whether I have been by any cause wholly or partially freed from my obligation." *Cocke v. Blackbourn,* 57 Miss. 689. A case almost identical on the facts is *McDonald v. Kamper,* 89 Miss. 221, 42 South. 877. Authorities which may seem to hold otherwise will be found to be readily distinguishable on the facts of each particular case.

There is no merit in the contention that no credit should have been allowed for payments made on Sunday. Creditors may not receive and retain such amounts and again enforce their payment. 27 Am. & Eng. Ency. Law (2d ed.), 408. Upon this record we do not feel justified in overturning the chancellor's finding on the facts.

Affirmed.

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Brief for appellants.

FRANKLIN M. GROSS v. JAMES H. TODD ET AL.

[47 South. 801.]

1. EVIDENCE. *Articles of copartnership. Parol to vary.*

A written contract for a partnership in the business of "overhauling machinery" cannot be altered by parol evidence showing that one of the partners was to teach the other a trade.

2. JUDGMENTS. *Res adjudicata. Series of notes. Defenses.*

A judgment for the plaintiff in a suit on the first of a series of notes given for the same consideration, begun before the maturity of the others, maintaining in part the defense of failure of consideration made by defendant and measuring its extent to be less than the amount of the first note, is *res adjudicata* of and a complete answer to the same defense when made to a suit on the other notes of the series.

FROM the circuit court of Pontotoc county.

HON. EUGENE O. SYKES, Judge.

Gross, appellant, was plaintiff in the court below; Todd and another, appellees, were defendants there. From a judgment in plaintiff's favor for a sum much less than his demand, plaintiff appealed to the supreme court.

The suit was upon the second of a series of three promissory notes given appellant by appellees; the first note was for $50 and the others for $100 each, and they were all executed by appellees as a consideration for the investiture in one of the defendants of an interest in the business of the appellant, evidenced by the following writing:

"Contract. Oct. 11, 1902. State of Misssissippi, Pontotoc county: This agreement between F. M. Gross and J. H. Todd, which formed a partnership in overhauling machinery as full partners anywhere in the south and southwest and northwest, and the proceeds to be equally divided as the work is done. He, J. H. Todd, would do everything in his power to learn and assist

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Brief for appellant.

F. M. Gross in carrying on this year's work. J. H. Todd agrees to put in all of his time from the 1st of October, 1902, to October 1, 1903. To secure F. M. Gross in the performance of this work he puts in one mare called Mand, one-half set harness, one-half machine wagon, one-half of tools and fittings which is his property, which now is at J. H. Todd's house, Thaxton, Mississippi, valued at about four hundred and fifty ($450.00) dollars. Should J. H. Todd fail to perform his part of this contract, said property shall revert to F. M. Gross.

"(Signed) J. H. TODD."

On the trial it was shown that separate suits had been brought by Gross on each of the three notes, and that at a former term of court judgment had been rendered in the first suit on the note for $50; the jury in that suit having passed upon the defense of a failure of the consideration for which the notes were given and, by finding a verdict in plaintiff's favor for only $5, had thereby decided that the defendants were entitled only to a credit of $45, because of a partial failure of the consideration for which all the notes were given. On the trial of the present case the appellees were permitted to make the same defense, and the jury returned a verdict in plaintiff's favor for $12.50.

Mitchell & Mitchell, for appellant.

As the contract between the parties was in writing, it was error to permit parol evidence to be offered to show that appellant was to teach Todd, appellee, a trade. Every agreement of the two parties was written in the contract, and it of course spoke for itself. The only consideration for the notes was the interest bought from Gross by Todd in the tools, fittings and wagon. No effort is made to show that these things were not as represented or that Todd did not receive them, but the only defense was that Gross did not carry out the partnership agreement. Now, no violation of the partnership agreement could be available as a defense to the non-payment of the notes; for Todd

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got what he bought, namely, a joint ownership with Gross in the tools and other property mentioned in the written contract.

Todd, the appellee, testified that he had no defense to the $100 note in question except that which he had already pleaded in the former suit of Gross against him on the $50 note; and it is shown that in the former suit the value of that defense had been passed upon by a competent jury and verdict and judgment rendered as to same. In other words, the jury, in the former suit, decided that Todd's whole defense could avail him only to the amount of $45, the difference between the $50 note and the $5 verdict. How is it possible then that appellee can interpose the same defense to an action against him on the $100 note or on the third note of the series? It is virtually permitting a defendant to avail himself, and receive the benefit of, the same set-off in two actions brought against him by the same plaintiff. This conclusion is inevitable. In the present case the jury placed a higher value on the defense than did the jury in the former case unappealed from. Shall the appellees be again allowed the same defense to the remaining note of the three, thus allowing them the use of such defense three separate times against different demands, and availing themselves each time of such value as a different jury may see proper to assess? The idea is preposterous. See *Davis v. Hart,* 66 Miss. 642, 6 South. 318; *Gardner v. Buckbee,* 3 Cow. 127; *Bouchard v. Dias,* 3 Denio, 243; *Lumber Co. v. Buchtel,* 101 U. S. 638; Wells on Res Judicata, §§ 210, 221, 285; and *French v. Howard,* 14 Ind. 455.

Fontaine & Fontaine, for appellees.

Consideration, want of consideration and failure of consideration can always be shown in evidence. Todd, the appellee, was a competent witness. There is no written contract or agreement showing what the consideration of the note was, or showing that the consideration had failed. There is nothing in the

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Opinion of the court.

partnership agreement relied on by appellant to show what was the consideration for the three notes.

A failure of consideration implied that there was a consideration sufficient to support the contract, but that the consideration had subsequently and without fault of defendant failed wholly or in part. 3 Words and Phrases, 3637. And it is not the recovery, but the matter alleged by the parties and upon which the recovery proceeds, which creates estoppel. *Lumber Co. v. Buchtel,* 101 U. S. 638. The case of *Davis v. Hart,* 66 Miss. 642, 6 South. 318, confines the estoppel to trial on the merits alone, and not the amount of recovery.

WHITFIELD, C. J., delivered the opinion of the court.

The contract in writing, of October 11, 1902, signed by J. H. Todd, made between F. M. Gross and himself, was the sole expository of its own terms, and the parol evidence offered to show that Gross was to teach Todd a trade was erroneously admitted, since it altered the terms of that contract. Todd admitted, on the witness stand, that his defense was precisely the same against each of the three notes; that there was no difference whatever, in any respect, between his defense to the first note of $50 and the two other notes for $100 each. The jury had measured the full value of his defense in the suit on the $50 note, and fixed that value at $45, rendering a judgment for the plaintiff in that suit for $5 only. On this state of case *Davis v. Hart,* 66 Miss. 642, 6 South. 318, settles the proposition that the first judgment for $5 on the $50 note was *res judicata* as to the value of the defense in its entirety, and that defense, consisting simply of failure of consideration, should not have been allowed to be interposed in either of the other two suits, since the jury had measured how much the consideration had failed in the first suit, and fixed the amount of such failure at $45.

Reversed and remanded.

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AVERY & SON v. WILLIAM C. MCCLURE ET AL.

[47 South. 901.]

CORPORATIONS. *Debts. Stockholders. Directors. Personal liability. Code* 1906, §§ 909, 923, 924. *Patent. Infringement of. Torts.*

The infringement of a patent is a tort, and a judgment against a corporation for damages resulting therefrom is not a debt within the meaning of:—

(*a*) Code 1906, § 909, providing that every stockholder of a corporation shall be individually liable for its debts contracted during his ownership of the stock to the extent of any unpaid balance on his subscription therefor, the liability to continue for one year after his transfer of the stock, and that any creditor of the company may sue therefor; nor

(*b*) Code 1906, § 923, providing that the directors of an insolvent corporation assenting to a diversion of its capital stock or the payment of a dividend, and the stockholder receiving a dividend, shall be jointly liable to the existing creditors of the corporation to the extent of the withdrawal or payment, with interest; nor

(*c*) Code 1906, § 924, limiting the amount of debts which a trading corporation should contract and making the directors who contracted debts in excess thereof personally liable therefor.

FROM the chancery court of Lowndes county.

HON. JAMES F. MCCOOL, Chancellor.

Avery & Son, a corporation, appellant, was complainant in the court below; McClure and others, appellees, were defendants there. From a decree in defendants' favor the complainant appealed to the supreme court. The opinion of the court states the facts.

W. H. Clifton, for appellant.

The appellees' plea in the court below is insufficient in law, and appellant should have been awarded a decree final against the appellees. *Railway Co. v. Brooks,* 69 Miss. 168, 13 South. 847; *Richberger v. Express Co.,* 73 Miss. 161, 18 South. 922.

It is the settled law in Mississippi that in causes arising *ex*

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delicto the tort may be waived, and recovery be had in assumpsit on the implied contract, growing out of the principle that *ex acquo atque bono* the defendant should make good the damage done to the plaintiff; or penalty may be recovered in an action of debt. *Evans v. Miller,* 58 Miss. 120; *Miller v. Wesson,* 58 Miss. 931.

A cause of action *ex delicto* can hardly be conceived of from which the element of implied contract will be wholly absent. Blackstone, in his definition of actions upon implied contracts, is comprehensive enough to embrace almost every action on the case save slander, libel and assault and battery. In the present condition of the law the abolishment of the forms of actions has practically done away with the distinction sought by appellees to be made in this case, namely, that the chancery court has no jurisdiction of torts and that the recovery by appellant could be only upon an implied contract. It is apparent from the record that the appellant was and is a creditor of the corporation, the Dodson Plow Company, subsequently called the New South Plow Company; that the debt due by it to appellant is a fixed sum growing out of a transaction making the stockholders to an extent liable to appellant for the corporation's debt. The record being conclusive of these facts, the inquiry which the appellees' plea makes is wholly immaterial; and, as it is no defense to the suit, is insufficient in law and should be stricken from the files. *Lamb v. Russell,* 81 Miss. 382, 32 South. 916; Code 1892, § 852.

A judgment creditor of an insolvent corporation, on return of execution indorsed *nulla bona,* may sue in equity the different stockholders of the corporation for balance unpaid on stock subscribed for by them severally, and for dividends received by them when the corporation is insolvent. 10 Cyc. 660, 682; Code 1892, § 844; *Vicks v. Lane,* 56 Miss. 681; *Perkins v. Sanders,* 56 Miss. 733; *Robinette v. Starling,* 72 Miss. 652; *Hatch v. Dana,* 101 U. S. 205, 25 L. Ed. 885; *Miller v. Bradish* (Iowa), 28 N. W. 594.

The judgment of the federal court must be held *res judicata*

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Brief for appellees.

of the facts set up in the plea, such facts being embraced within the issue of the chancery suit against the corporation and the stockholders of the corporation being privies to that suit. 10 Cyc. 672, 733; 21 Am. & Eng. Ency. Law (1st ed.), 181; Thompson on Liability of Stockholders, § 239; *Powell v. Railroad Co.*, 3 L. R. A. 201; *Heggie v. Building Ass'n* (N. C.), 12 S. E. 277; *Lehmann v. Glenn* (Ala.), 6 South. 44; Freeman on Judgments, § 177.

The capital stock and other property of a corporation constitute a trust fund in the hands of the stockholders for the payment of corporate obligations. 26 Am. & Eng. Ency. of Law (2d ed.), 1007, note 6; *Lewis v. Robertson,* 13 Smed. & M. 558; *Payne v. Bullard,* 23 Miss. 88; Beach on Private Corporations, §§ 116, 117; *Hatch v. Dana,* 101 U. S. 205, 25 L. Ed. 885. And our own court has declared recently that the only defense which may be set up by the stockholder in a suit based upon such principle is that of payment. *Robinette v. Starling,* 72 Miss. 652, 18 South. 42; *Vick v. La Rochelle,* 57 Miss. 602.

In *Carver v. Braintree Mfg. Co.,* 2 Story, 432, Fed. Cas. No. 2,485, the United States supreme court held that the word "debts" is equivalent to "dues," and the word "contracted" equivalent to "incurred." Hence the phrase "debts contracted," used in Code 1892, § 844 (Code 1906, § 909), means "dues owing or liabilities incurred," and should cover unliquidated claims arising from torts. And as the damages in this case arose from the infringement of a patent right, the rule is applicable. *Chase v. Curtis,* 113 U. S. 452; *Flash v. Conn,* 109 U. S. 371, 27 L. Ed. 969; *Cable v. McCue,* 72 Am. Dec. 214; Beach on Private Corporations, § 150; *Powell v. Railroad Co.,* 3 L. R. A. 202; 10 Cyc. 734.

William Baldwin, for appellees.

The charter of the corporation, Dodson Plow Company, was granted in 1904, and was amended in 1905; hence the powers and liabilities of the corporation are governed by Code 1892.

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Brief for appellees.

Every stockholder subscribing for stock in the corporation did so under the knowledge that his liability was limited by the statute law of Code 1892, § 844, amended Laws 1894, ch. 55. Under such law, if Avery & Son holds a debt "contracted" by the corporation during the ownership of stock by any of the appellees, recourse may be made against such appellees for the amount of any unpaid subscription on the stock; otherwise not.

With hardly a dissenting voice the courts of our land have always held that a stockholder who subscribed for stock is liable on his unpaid subscription for the contractual debts of the corporation, but not for liabilities of the corporation growing out of its torts. The corporation and its corporate assets stand liable for the torts or wrongdoing of its officers because it is the duty of the corporation to see that none of its employees shall violate the rights of other persons, and it becomes responsible for such violation of the rights of others arising from torts, according to the ordinary law of principal and agent. But the stockholder's relation to a party whose rights are infringed upon through the corporation's tort, is entirely different. The stockholder has done no wrong, and in all probability knows nothing of it at the time of its occurrence, is not a party to it, and would no doubt gladly prevent it if he could. After the proper officers of the corporation are elected, the stockholder has fulfilled his duty; and the performance of the duties of the officers is a matter for the corporation's consideration, not the individual stockholder's.

One dealing with a corporation looks to it for two things as a basis of credit to the corporation, namely, the corporation's property and the corporation's capital stock; these two items being all that a corporation can have with which to respond to the demands of creditors. And a party dealing with a corporation has the right to demand that the capital stock of the corporation be paid in or that it will be paid in, if necessary, to satisfy the debts due by the corporation. Any creditor who contracts with a corporation can in law assume that it has the

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amount of its capital stock paid in, or that such capital stock will be fully paid in when necessary, to settle the contracts of the corporation with its creditors. And it follows that this basis of credit becomes one of the rights of the creditors contracting on the faith of such assumption. But such is not the rule where the claim of a party against a corporation is founded upon tort. No obligation in his favor exists because of credit extended. The party injured by the tort has not dealt with the corporation at all. Beach on Private Corporation, § 151; Clark & Marshall on Private Corporations, 2479*b*; 26 Am. & Eng. Ency. Law (2d ed.), 1024, 1025, note I.

What is the claim sued on here? It is damage arising from the infringement of a patent; and nothing more. It is true that the decree was rendered in a court of equity, because the revised statutes of the United States 1875, §§ 4918, 4919, 4921, give jurisdiction to such court to grant decree for damages although arising from tort. But this does not affect the situation. The case was in tort, and will be so considered by any and all courts. *Chase v. Curtiss*, 113 U. S. 452, 28 L. Ed. 1042; *Louisiana v. New Orleans*, 109 U. S. 285.

It is not denied here that a judgment against a corporation is binding upon the stockholders and cannot be questioned or its merits inquired into in a subsequent suit. But a judgment against the corporation is an entirely different thing from a judgment against the individuals who comprise the stockholders of the corporation. *New Orleans, etc., R. Co. v. Hurst*, 36 Miss. 667.

Where property has been wrongly converted and sold, the owner may waive the tort and sue for the money value; but the foundation of the action is in tort and not in contract.

Avery & Son never was a "creditor" of appellees. Nor did the "debt" sued on in the present case exist when the alleged dividends were declared.

As to any claim upon the directors of the corporation, it is only necessary to say that Code 1906, § 924, providing that

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directors shall in certain cases become individually liable for excess of indebtedness over the capital stock, and may be sued therefor by any creditor, refers merely to creditors whose debts are based upon contracts. The intent of the statute is merely to protect creditors of a certain kind, that is, only such creditors as have dealt with the corporation in ignorance of the reckless conduct of the directors. The directors are not made liable as individuals for the payment of the liabilities of the corporation adjudged as a result of the corporation's torts. 10 Cyc. 666.

Newman Cayce, on the same side.

The appellees are not the New South Plow Company, but are merely individual stockholders and sued as such. The individual liability of the stockholders of a corporation is dependent upon statute law, and does not exist at common law. *Terry v. Little,* 101 U. S. 216, 25 L. Ed. 864; Cook on Corporations, § 217; Beach on Corporations, § 151.

The individual liability of stockholders is fixed by the law of the state granting the charter; and stockholders are liable only according to the plain meaning of the terms employed by the legislature of such state, and not otherwise. This principle is universally recognized and enforced in all courts. The statute law of Mississippi, imposing liability upon individual stockholders, shows clearly that the legal intent is that individual stockholders of a corporation are liable only upon debts of the corporation resting in contract and dependent upon contractual relations. The wording of Code 1906, § 909, is that in all corporations each stockholder shall be individually liable for the debts *contracted.* Code 1906, § 924, states that under certain circumstances the directors of the corporation shall be liable for excess of debts *contracted.* Nothing is said about torts, and the corporation of itself cannot by its action or inaction add to the liability fixed by the statute law.

The federal court's judgment against the corporation based

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upon the infringement of the patent was in no way conclusive against the individual stockholders. Their individual liability could not have been determined by the federal court in the suit wherein judgment was rendered. There can be no *res judicata* as regards the rights of the individual stockholders to file their plea in the present suit.

A judgment does not and cannot change the nature of the cause of action upon which it is founded, nor can it impose, in a case like this, a liability upon stockholders of the defendant corporation, a liability which the law did not impose before the rendition of the judgment. If the judgment of appellant in the federal court against the New South Plow Company had been rendered upon a cause of action *ex contractu*, then cause would exist for claiming the judgment to be conclusive, as against the stockholders, because in all matters of contract the officers of the corporation are the agents of the stockholders. But where the judgment against the corporation rests wholly in tort, then an entirely different case is presented. In cases of tort against a corporation the individual stockholders are not parties to the action, and are not represented therein by the corporation, and the judgment against the corporation, if rendered, will in no way make the stockholders individually liable; the proceeding against the corporation being, as to them as individuals, *res inter alios acta*.

Officers of a corporation, in committing torts, are acting without authority of law and without even the implied consent of the individual stockholders; and are hence never to be considered as agents of the individual stockholders. *Carroll v. Green*, 2 Otto (U. S.), 509, 28 L. Ed. 239; Morawitz on Private Corporations, 882; Clarke & Marshall on Private Corporations, 2601; *Leighton v. Campbell* (R. I.), 9 L. R. A. 187; *Miller v. White*, 50 N. Y. 137; *Whitney v. Barlow*, 62 N. Y. 62; *Esmond v. Pullard*, 16 Hun, 65; *Cable v. McCune*, 26 Mo. 371, 72 Am. Dec. 214; *Cable v. Gaty*, 34 Mo. 572; *Bohn v. Brown*, 33 Mich. 257; *Chase v. Curtiss*, 113 U. S. 452, 23 L.

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Ed. 1038; *Poley v. Lacert,* 35 Ore. 64, 58 Pac. 37; *Childe v. Boston Iron Works,* 137 Mass. 518.

In construing the statute law applicable to the case at bar, it must be kept in mind that all words and phrases contained in the statute law are used accordingly to their common and ordinary acceptation and meaning.

Betts & Sturdivant, on the same side.

The infringement of a patent is a tort; and a recovery for infringement is not for a breach of an implied contract. 16 Ency. Pl. & Pr. 79; *Leighton v. Campbell,* 9 L. R. A. 187. The character of an action must be determined by the nature of the alleged grievance rather than by the form of action. *New Orleans, etc., R. Co. v. Hurst,* 36 Miss. 668.

Statutes creating liability of stockholders for the debts of the corporation must be strictly construed. 26 Am. & Eng. Ency. Law (2d ed.), 1032, sec. 2.

A judgment against a corporation for damages because of an infringement of a patent does not constitute a "debt" for which the individuals who are stockholders will be held liable. 10 Cyc. 684, 685, 734.

FLETCHER, J., delivered the opinion of the court.

In 1904 there was organized and incorporated a corporation known as the Dodson Plow Company, domiciled at Columbus. Some time later the corporate name was changed to the New South Plow Company and the capital stock was increased. The corporation found it necessary to borrow considerable sums of money aggregating some $35,000, from various banks in Columbus and Aberdeen, and to secure these sums executed deeds of trust on all its property for the benefit of the banks and of one Charles R. Smith, who was an accommodation indorser on certain of the company's paper. It seems that the corporation virtually suspended operations after the execution of these trust deeds and may be said to be without assets and hopelessly insol-

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vent. In November, 1906, Avery & Son, a Kentucky corporation, exhibited its bill in the circuit court of the United States for the Northern District of Mississippi against the New South Plow Company, averring in substance that the defendant company had infringed a patent owned by Avery & Son, and praying for an injunction against the further use of this patent and for an award of damages. No defense was made to this suit, and in April, 1907, a *pro confesso* was taken and a final decree entered, making the injunction perpetual and awarding Avery & Son damages in the sum of $3,000. An execution was issued on this decree of the federal court and returned *"nulla bona."* Thereupon in September, 1907, Avery & Son filed a bill in the chancery court of Lowndes county against the stockholders and directors of the New South Plow Company, seeking to hold them liable for the $3,000 evidenced by the federal court judgment—the contention being that the stockholders were liable under section 909 of the Code of 1906 "for the amount or any balance that may remain unpaid for the stock subscribed for by them;" further, that under section 923 of the Code the directors and stockholders were liable for the amount of capital stock withdrawn and dividends declared while the company was insolvent; further, that the directors were liable under section 924 of the Code for debts contracted in excess of the amount of capital stock. Defendants filed their plea, setting up the fact that the demand of Avery & Son was based upon a judgment for infringement of patent and was not such a debt as the statute contemplated. This plea was held good by the court below and the bill dismissed. This appeal, therefore, presents the single question whether damages awarded for the infringement of a patent fall within the meaning of our statutes making directors and stockholders liable under certain circumstances for the debts of the corporation.

There can be no doubt that the infringement of a patent is a tort. 16 Ency. Pl. & Pr. 79. It is argued, however, that, though this be an action *ex delicto*, yet the tort may be waived,

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and the wrong treated, as having arisen from the breach of an implied contract; and in support of this contention *Evans v. Miller,* 58 Miss. 120, 38 Am. Rep. 313, and *Miller v. Wesson,* 58 Miss. 831, are cited. Both these cases deal with the recovery of the value of trees cut from the plaintiff's land and by the defendant converted to his use. The precise holding is thus stated in the *Evans case:* "The action of assumpsit can be maintained, though there was no actual conversion of the trees into money. It is held by many courts of high authority that a tort can only be waived, and an action *ex contractu* maintained, where the tortfeasor has converted into money the proceeds of his wrongful act, and has thus subjected himself to an action for money had and received. An intimation of this sort was thrown out in *O'Conley v. City of Natchez,* 1 Smedes & M. 46, 40 Am. Dec. 87, and again in *Mhoon v. Greenfield,* 52 Miss. 440, and certainly it is supported by many adjudicated cases in England and America. A more liberal, and we think a more sensible, rule is laid down by the later text-writers, and sustained by many courts, to the effect that the tort may be waived and assumpsit maintained whenever the property taken has been converted either into money or into any other beneficial use by the wrongdoer, and especially where it has been so applied to his use as to lose its identity. Cooley on Torts, 95, and cases cited; 2 Greenl. on Evidence, § 108, note 5; 1 Hill on Torts, 42; note 'a.'

"It is impossible to perceive any valid objection to this doctrine. So long as the trespasser retains, in its original shape, the property taken, he may logically deny that he holds it under a contract, and demand that he be proceeded against in tort, and that the tort be established against him; but when he has parted with it, either for money or other property, or when he has mingled it in its use, or changed its form, he should not be permitted to deny the assumption to pay its value which the law imputes from his method of dealing with it." This is all that is held in these cases, and certainly no warrant can here be found for abolishing all distinctions between actions *ex delicto* and *ex*

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contractu. The true basis of the perfectly correct holding in these cases is thus stated by the supreme court of Massachusetts: "It is a well-known rule that, if property has been wrongfully converted and sold, the owner may waive the tort and sue for the money; but the foundation of the action is a tort for which trespass or case would lie, and the action proceeds, not on the ground of a contract, but of an equitable obligation to pay over the proceeds of the sale. *Jones v. Hoar,* 5 Pick. (Mass.) 285; *Bigelow v. Jones,* 10 Pick. (Mass.) 161. *Child v. Boston & Fairhaven Iron Works,* 137 Mass. 516, 50 Am. Rep. 328.

We think there can be no real dissent from the conclusion that an infringement of a patent is a tort, and that there can be no recovery upon the theory that the damages were awarded for any breach of an implied contract. The question before us is, therefore, broadly, whether the term "debts," as used in our statute, can be held to include damages awarded for the commission of torts. It should be remembered that we must look to our statutes, and to our statutes alone, in determining this question of liability; for at common law the stockholders were not liable for any of the obligations of a corporation, whatever their character and in whatever manner incurred. *Terry v. Little,* 101 U. S. 216, 25 L. Ed. 864. It is necessary, therefore, to give careful scrutiny to the exact terms of the statute.

Section 909 provides: "In all corporations each stockholder shall be individually liable for the debts of the corporation contracted during his ownership of stock, for the amount of any balance that may remain unpaid for the stock subscribed for by him, and may be sued by any creditor of the corporation; and such liability shall continue for one year after the sale or transfer of the stock. The stock in all corporations shall be transferable by the indorsement and delivery of the stock certificate and the registry of such transfer in the books of the corporation."

Section 923 provides: "No part of the capital stock in any corporation shall be withdrawn or diverted from its purpose, nor a dividend declared, when the company is insolvent, or would be

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rendered insolvent by such withdrawal or the payment of such dividend; and the directors who assented to such withdrawal, or declared and paid such dividend, as well as the stockholders who received it, shall be jointly and severally liable to creditors whose debts then existed, to the extend of such withdrawal or dividend and interest."

Section 924 provides: "The amount of debts which any trading corporation or company may contract or owe shall not exceed the amount of its capital stock paid in; and in case the debts exceed that amount, the directors who contracted such debts shall be individually liable for the excess over the amount of capital stock, and may be sued therefor by any creditor, whether the debt be due at the time of suit brought or not, if such creditor was without notice or knowledge of the excess at the time his debt was made."

It will thus be seen that the statute speaks of "debts contracted" and "debts existing," and for the payment of these obligations the directors and stockholders are liable. These being the terms employed, we are not left without guidance in the authorities. The rule is thus stated by Beach: "The 'debts' of a corporation, for which its members are made liable by statute, are such claims against it as arise from contract, and do not include a judgment against the company for tort, even through the tortious act might have been considered a breach of contract, nor costs in such action." Beach on Private Corporations, § 151. To the same effect is another approved authority: "The statutory liability imposed upon the stockholders in corporations is a liability exclusively for debts and demands accruing against the corporation by reason of its contracts. It cannot, therefore, be enforced to pay damages recovered against the corporation in an action in tort." 1 Cook on Corporations, § 217.

One of the earliest and most emphatic cases on the subject is *Heacock v. Sherman,* 14 Wend. (N. Y.) 58, construing and applying a statute much more comprehensive than our own. It is there said: "The eighth section of the act incorporating the

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Buffalo Hydraulic Association (St. 1827, p. 45) enacts: 'That the stockholders of the said corporation shall be holden jointly and severally to the nominal amount of their stock, for the payment of all debts contracted by the said corporation, or by their agents; and any person or persons having any demand against the said corporation may sue any stockholder or stockholders, in any court having cognizance thereof, and recover the same with costs; provided that no stockholder shall be obliged to pay more in the whole than the amount of the stock he may hold in the said company at the time the debt accrued.' The term 'demand' is undoubtedly broad enough, if it stood alone, to embrace the claim of the plaintiff. It is a word of the most extensive signification that can be used in a release, and operates to discharge the release from every cause of action existing at the time in favor of the party executing it. We must, however, look at the whole section, and the connection in which it stands, in order to fix its meaning in this case. The stockholders, in the first place, are made jointly and severally holden for the payment of all debts contracted by the corporation or by their agents. The liability is here declared. It is new, and unknown to the common law, and is in terms limited to demands *ex contractu*. The residue of the section was not intended to extend the liability thus declared, but is in furtherance of the remedy. Without it, it might be a question whether, under the first clause, a party would be bound to sue all the stockholders, or but one of them, agreeably to the rule of law respecting joint and several obligors. 1 Chitty's Pl. 30; 5 Bacon, tit. 'Obligation,' D, 4. But the proviso to the section is conclusive upon the point. Any person having a demand against the corporation is authorized to sue any stockholder, in any court, etc., 'provided that no stockholder shall be obliged to pay more, in the whole, than the amount of the stock he may hold in said company at the time the debt accrued'—thereby clearly qualifying the enlarged meaning of the word 'demand,' and showing, satisfactorily, that it was used by the legislature to denote a demand arising upon contract. Damage arising upon tort is not a debt

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accrued, within any reasonable construction of that term. It is apparent, as well from a view of the whole section as from an analysis of its parts, that the intent of the framers of it was only to make the stockholders individually responsible for the debts of the company."

This was quoted with approval, and indeed, made the basis of decision, by the supreme court of the United States in *Chase v. Curtiss,* 113 U. S. 452, 5 Sup. Ct. 554, 28 L. Ed. 1038. In that case Justice Matthews, in referring to a contention which is here made that the demand, when reduced to judgment, becomes a debt within the meaning of the statutes on the subject, says:

"But, if this proves anything, it proves too much, and, instead of showing the thing to be proved, that the judgment is conclusive evidence of a debt, it establishes, on the contrary, that a liability on the part of the corporation for a tort, though afterwards reduced to judgment against it, is not a debt of the corporation, even when in judgment, within the meaning of the statute imposing upon the trustees the penalty sought to be enforced in this action for not making and publishing an annual report showing, among other things, the amount of its existing debts. For, keeping in view the statement now urged by counsel of the impossibility, in advance of liquidation by the verdict of a jury, of even approximately, much less accurately, stating the amount of such a liability, can it be supposed that the duty to do so is developed upon the trustees within either the letter or spirit of this statute, under penalty of becoming personally liable to pay whatever judgment may be thereafter rendered on account thereof against the corporation? Surely not. Such claims are not within the contemplation of the act. The mischief to be prevented by its requirements has no relation to liabilities of that description. The creditors to be protected are those only who become such by voluntary transactions, in reference to which, for their benefit, the information becomes important as to the debts of the company."

The issues and contentions here involved were made the sub-

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ject of a careful review by the supreme court of Missouri in *Cable v. McCune,* 26 Mo. 371, 72 Am. Dec. 214. It is there said:

"The question, however, here is, What class of demands is embraced within the words 'debts contracted?' Our legislature did not go the length which others have in fixing the liabilities of the stockholders of these manufacturing corporations. They did not enact, as in many other states it is enacted, that the stockholders should be responsible for every liability established against the corporation and which its assets turned out insufficient to meet. Such statutes as these, creating a general and determined liability, not dependent on circumstances, becoming as it were a part of the very essence of the charter, may reasonably admit of a very different construction from the law which seems to recognize the general principle of individual irresponsibility, subject to a very limited exception, and only ventures to hold out such responsibility as a penalty for a failure on the part of its managers to perform certain acts directed in the law, and supposed to furnish some advantages to the public. The statute, which Judge STORY construed in *Carver v. Braintree Mfg. Company,* 2 Story, 432, Fed. Cas. No. 2,485, was of this remedial character. That act declared that every member of the manufacturing company named should be liable in his individual capacity for all debts contracted whilst he was a member. There was no penalty for an omission or a commission. It was simply a recognition of the individual liability principle on the face of the charter. Called upon to construe such a charter, Judge STORY held it to be remedial, not penal, and, so viewing it, he gave the word 'debt,' which was the term used, a very liberal and extensive signification, to forward the manifest purposes of the law and the interest of society.

"Had our legislature taken the same step and boldly inserted such a provision in all their charters of this class of corporations, Judge STORY's views, forcible and reasonable as they are, ought to have great weight in determining the construction of

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such a statute. Judge STORY concedes that the interpretation he gives to the word 'debt' is a very loose one, and, in short, is making it synonymous with 'demand.' He substituted for the words 'debts contracted' the phrase 'dues owing' or 'liabilities incurred,' regarding them as essentially equivalent expressions. The result was that a demand founded on tort was equally within the meaning of the act with a debt, liquidated or unliquidated. We do not feel ourselves authorized, upon well-settled and long-established principles, to take this liberal view of the word 'debts' when used in our statute. Although the language is the same in the two statutes, ours is manifestly highly penal in its nature, whilst the Massachusetts act was considered by Judge STORY as a remedial one. The demand sought to be enforced in the present action is certainly not a debt in the legal acceptance of the term, and it is, to say the least, doubtful whether it could be so regarded in its popular acceptation. The defendants are entitled to the benefit of such doubts. The popular meaning of a term may very properly be resorted to in ascertaining its construction in a purely remedial statute, and the plain objects of such laws ought not to be defeated by a narrow and technical definition. Unfortunately there are some words—and this word 'debt' is perhaps one of them—the popular meaning of which is unsettled and fluctuating, and hard to be ascertained. Where there is room for doubt, and the statute is penal, the safer rule is to adhere to that limited and definite sense to which long-established legal usage has restricted it.

"The liability of the St. Louis Marine Railway & Dock Company to the plaintiffs was not a 'debt' within the legal acceptation of that term, as declared by Blackstone and other writers of established authority. It was not 'a sum of money due by certain and express agreement.' Whether the suit against the company which resulted in the judgment sought to be enforced against the defendant was one which would properly fall within the class of actions considered as founded on contract, or in that class which is based upon tort, is a more difficult question to de-

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termine, if it was important that it should be determined at all. In the division of actions made by Blackstone, it would probably be considered as founded on contract; for his definition of actions upon implied contracts is comprehensive enough to embrace almost every action on the case, exept slander, libel, assault and battery, and similar actions. In his sixth subdivision of actions upon implied contracts, Blackstone includes a variety of actions for what he terms breaches of implied duty or trust, which would comprehend almost every case of damage imaginable. This court, upon previous occasions, have treated actions like the present as substantially founded on tort, although a breach of contract is stated as inducement to the action. *Acks v. Ball,* 14 Mo. 396; *McDonald v. Forsyth,* 13 Mo. 549. So, in New York, Judge NELSON, in the case of *Heacock v. Sherman,* 14 Wend. 58, considered the action as one for damages upon a tort, and not arising upon contract, although, upon Blackstone's division of actions, that case, which was for the loss of a horse by reason of the failure of a corporation to keep a bridge in repair, might very well have been considered as an action for damages arising out of contract. There was an implied contract that the company should keep the bridge in repair, and by reason of their failure to comply with their obligations the damage resulted, and in this way the case might be said remotely to be founded on contract. But the real gist of the action, in that case as in this, was a tort, namely, the negligence and misfeasance of the corporation's agents, and the insufficiency of the bridge in the one case and of the dock in the other, by which the damage complained of was sustained. Such damages can hardly, in popular acceptation, be regarded as debts. Certainly it is by no means clear that the legislature meant to embrace such demands.

"We regret that in the examination of this subject we have been without any precedent to guide us. The only case directly in point is the one cited from Massachusetts (*Milldam Foundry v. Hovey,* 21 Pick. 417), and that is undoubtedly against

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the conclusion to which we have arrived. An opinion of a court of such acknowledged ability as the supreme court of Massachusetts is entitled to great respect, but the circumstances under which that opinion was delivered detract somewhat from its importance as authority. The question arose incidentally upon the exclusion of a witness, and it would seem, from the curt manner in which the court disposed of it, that not much importance was attached to its decision. No investigation was made into the matter upon principle or authority, and it is easily inferred, from a perusal of the case, which turned principally upon other points, that the question here considered was entirely a subordinate one, and its decision either way probably had no material influence upon the result. The statute under which the question arose seems to have differed from ours in the use of the word 'contracts,' as well as 'debts,' although the court did not, so far as I can perceive, attach any particular importance to this word. Under these circumstances, the case, as a mere precedent, does not appear entitled to great weight, notwithstanding the respectability of the court which decided it. On the other hand, the case of *Heacock v. Sherman,* 14 Wend. (N. Y.) 58, is an authority, not only directly in variance with the decision of the supreme court of Massachusetts, but also entirely irreconcilable with Judge STORY'S views in *Carver v. Braintree Mfg. Company,* 2 Story, 432, Fed. Cas. No. 2,485. Judge NELSON, who delivered the opinion of the court in that case refused to give a construction to the words 'debts contracted' that would embrace a demand for damages in an action founded on a tort. The other authorities referred to in the argument of this case are upon statutes essentially different from the one now under consideration."

We have thus set out these views at some length, for the obvious reason that they contain what we conceive to be the true theory upon all the propositions involved in this case. The opinion distinguishes, and distinctly limits, if it does not wholly disregard, the case of *Carver v. Braintree Mfg. Company,* 2

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Story, 432, Fed. Cas. No. 2,485, a case which may be said to be the foundation of the theory that individual stockholders under statutes similar to ours can ever be held personally liable for the torts of the corporation. This opinion of Judge STORY, however, gives us less concern, since its doctrine has been expressly repudiated by the Massachusetts court itself, as will be seen from the opinion in *Child v. Boston & Fairbanks Iron Works,* 137 Mass. 516, 50 Am. Rep. 328, in which it is said that Judge STORY's decision stands unsupported by any direct authority, either before or since. This last-cited case is of especial value, since it was a case of damages arising from the infringement of a patent, which demand was held to arise *ex delicto,* and therefore not to be considered as a "debt contracted by the corporation." It is true that in volume 23 of the first edition of the American and English Encyclopedia of Law, at page 870, occurs a statement that there is a conflict of authority as to whether the term "debts" includes claims for damages arising from torts, and also true that a table of cases is appended which are said to support the affirmative of this proposition. But an examination of these cases will show that a majority of them are positive and emphatic authorities for the opposing view. In this list are included *Chase v. Curtis, Cable v. McCune, Child v. Washburn Iron Works,* and *Heacock v. Sherman,* all of which have been noted above as supporting the conclusions reached in this opinion. A careful examination of the entire list shows that practically all these decisions fail to support the statement in the note. The second edition of this work states correctly that unliquidated damages arising from the commission of a tort by the corporation or its agents are usually held not to be "debts," within the meaning of that term as used in the statutes imposing liability upon stockholders. 26 Am. & Eng. Ency. of Law (2d ed.), 1024, 1025.

These authorities not only settle the proposition as to the nonliability of the stockholders for damages arising from tort, but many of these cases further consider the contention that the

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status of the claim is affected by the fact that the claim has been reduced to judgment. All of these authorities agree that the reduction of these claims to judgment does not change the nature of the demand, nor serve to extend the scope and significance of the term "debts," as this word is employed in the statutes. On principle we are in hearty accord with the reasoning and conclusions of these decisions. It seems to us an impossible view that the legislature ever intended to hold stockholders liable for any demands other than those growing out of the contractual relations between the corporation and its creditors. These statutes proceed upon the theory that any one extending credit to the corporation has a right to presume conclusively that the stock subscribed has been fully paid in, that the capital stock of an insolvent concern shall not be distributed in dividends, and that the corporation shall not contract debts in excess of its capital stock. As to these matters the directors and stockholders are held liable; but it surely never was intended that the consequences of tortious conduct on the part of the corporation or its agent should be visited upon the stockholders. Such demands are necessarily unliquidated, and no corporation would be warranted in declaring dividends, since it would be impossible to say with certainty that a judgment for tort might not arise which would render the corporation insolvent. The word "debts" should be construed according to its common and usually understood significance, and so construing it, we think the learned court below correctly denied its application to a judgment for tort.

Affirmed.

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Statement of the case.

KEYSTONE LUMBER YARD v. YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

[47 South. 803.]

1. SUPREME COURT PRACTICE. *Demurrer to declaration. Good causes not assigned.*

A demurrer to a declaration will not be sustained by the supreme court on a ground not presented to nor passed upon by the trial court.

2. PLEADING AND PRACTICE. *Declarations. Writings filed with. Demurrers.*

A declaration at law may so plead the legal effect of a writing filed with it as to present the instrument itself for consideration on the hearing of a demurrer to the pleading.

3. RAILROAD COMMISSION. *Rule* 10. *Delayage. Declaration for. Necessary averment.*

A declaration against a common carrier for delayage, predicated of rule 10 of the Mississippi Railroad Commission, prescribing a penalty for delaying shipments "by side-tracking in transit," is demurrable if it fail to charge that the delayage sued for was caused by such side-tracking.

FROM the circuit court of Yazoo county.

HON. J. B. HOLDEN, Special Judge.

The Keystone Lumber Yard, appellant, was plaintiff in the court below; the Yazoo & Mississippi Valley Railroad Company, appellee, was defendant there. From a judgment sustaining the appellee's demurrer to plaintiff's declaration and, plaintiff declining to amend, dismissing the suit, plaintiff appealed to the supreme court.

The plaintiff's declaration alleged that: "Defendant, before and at the time of the making of the defaults hereinafter mentioned, was a common carrier of goods and chattels for hire, from all of the points named in the bill of particulars filed here-

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Statement of the case.

with, to Yazoo City, Mississippi, and the plaintiff caused to be delivered to said defendant at divers and sundry times from November 11, 1904, to September 23, 1907, inclusive, divers and sundry cars loaded with lumber, an itemized statement of which is filed herewith as 'Exhibit One,' and as a part hereof, showing the car initials of every car, the consignor of every car and the consignee (the plaintiff) of every car, the station from which every car was shipped, the point to which they were shipped (namely, Yazoo City), the date of the shipment of each car, the date each and every car was delivered to the plaintiff as consignee, the total number of days each car was en route, the days required for the transit of each and every car from the shipping point to Yazoo City, and the total number of days that each car was delayed in reaching plaintiff as consignee in Yazoo City, over and above the time required for its transportation, and the amount claimed by plaintiff against defendant for failure to deliver each car as defendant was obligated under the law to do, goods and chattels in each and every car being of the value of $200 to $600, to be taken care of and safely and promptly carried by the defendant from the sundry points afore-referred to, to the said point of destination and to be promptly delivered by defendant to plaintiff at Yazoo City, for certain reward in that behalf, in a reasonable time then next following; and although the defendant received the said cars so loaded with lumber as aforesaid, the defendant failed to deliver the said car within a reasonable time and in the reasonable time required by the demurrage and delayage rules fixed by the railroad commission of the state of Mississippi, which rules are in words and figures as shown in Exhibit Two hereto, made a part hereof;—to the damage of the plaintiff in the sum of $5,000," etc.

To this declaration the railroad company, appellee, demurred, on the following grounds:

"(1) That no cause of action is stated in said declaration against the defendant. (2) That said cause of action is based solely on the rules and regulations adopted by the railroad com-

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mission of the state of Mississippi, on the 8th day of June, 1904, and in said rules and regulations no right of action is granted to the consignee for delay of shipments, but same is confined entirely to the shipper. (3) That, even if the railroad commission of the state of Mississippi were authorized by the legislature to supervise car service associations, the said order of the railroad commission is unconstitutional and void, both under the constitution of the state of Mississippi and the constitution of the United States, in that it gives to the shipper the right to set off alleged delayage, charges claimed by him against any claim of the railroad company at one dollar per day and this is the taking of the property of the railroad company without due process of law. (4) That, even if the railroad commission is granted the right under the law to supervise car service associations, the said charge made for delayage is unconstitutional and void, for the reason that neither under the Code nor under the statute law is the railroad commission given the power to regulate and fix on railroad companies either penalties or fixed charges. (5) That That said orders of the railroad commission, even if it had the right to regulate the same, is arbitrary and oppressive, and fixes a penalty on railroad companies, ignoring entirely the element of actual damages."

The provision of Rule 10 of the Mississippi railroad commission involved is quoted in the opinion of the court.

Henry, Barbour & Henry, for appellant.

The fourth paragraph of rule ten of the demurrage and delayage rules had no purpose other than to give to consignees the benefit of delayage mentioned therein. Otherwise the paragraph is meaningless. It is true that the word, consignees, is not used in the paragraph, but unless it be applicable to a consignee the true intent of the rule will, in many cases, not be attained. The preceding part of the rule applies to demurrage and delayage as between the railroad company and the shipper. The fourth and fifth paragraphs can be of no concern to the

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shipper for the reason that when the car leaves the shipper's hands he has nothing further to do with it, and the contents of the car have become the property of the consignee. The railroad company has done its duty as regards the shipper when the car is started forth upon its journey to the consignee. So long as the shipper holds the car by reason of failure to load or because he has not given shipping instructions or because he has improperly loaded the car, he is liable to demurrage; and when the car is properly loaded and shipping instructions given, bill of lading must be issued, and if the car is not forwarded upon its journey within twenty-four hours thereafter, then the railroad company is liable to the shipper for delayage. This part of the rule is for the purpose of preventing the shipper from accumulating and holding idle many cars without compensation to the railroad company, and to prevent the railroad company, after the cars are properly loaded and shipping instructions given it, from blocking the shipper's siding by keeping cars thereon, without compensation. But no such reciprocal rights and duties exist between the railroad company and the shipper after the car leaves the shipping point. If the car is side-tracked indefinitely, the shipper loses nothing, for the consignee must pay him just the same whether or not delivery be made to the consignee within a reasonable time; and in such case the consignee must look to the railroad company for redress or reimbursement.

After the shipment goes forward, the delivery or non-delivery of the consignment is then a matter between the railroad company and the consignee, and their rights and duties are then reciprocal. The railroad company must deliver and the consignee receive within a reasonable time, and if either fails in the duty the other must be compensated. Accordingly the demurrer should have been overruled.

Under the second paragraph of rule ten in question it is not necessary for the declaration to set forth the failure of the railroad company to give the notice required, nor is it necessary to set forth its failure to deliver the freight at its depot or ware-

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house; nor, in case of shipment for track delivery, to allege that cars were not placed accessible for unloading. For all of the foregoing must be defensive matter.

Certainly the consignee makes out a *prima facie* case when he alleges and proves that the car was not delivered to him in a given number of days and not within a reasonable time.

It will be noted that the court below expressly ruled against the appellee as to all the other questions raised by the demurrer, under authority of *Keystone Lumber Co. v. Yazoo, etc., R. Co.*, 90 Miss. 391, 43 South. 605.

Edgar L. Brown, on the same side.

The delayage charge is no more a penalty than is a demurrage charge. Demurrage is imposed as a compensation to the railroad company for a breach of obligation to load or unload promptly upon the part of shipper or consignee. Delayage is imposed as compensation for the railroad company's breach of duty to furnish promptly cars and transportation, the compensation to be due to the shipper or to the consignee as may be proper.

It will not do to say that delayage is a penalty because imposed without reference to whether or not the breach of duty results in damage to the shipper or the consignee. The same logic would make imposition of demurrage a penalty, for demurrage is imposed whether the railroad company has any immediate need or not for its cars.

Under the language of rule ten of the railroad commission effective June 18, 1904, delayage may be recovered either by the consignee or the shipper.

It will be noted that the court below held on the hearing of the demurrer that paragraph four of rule ten was not applicable to the case made by the declaration, because the consignee could not avail himself of such paragraph. Certainly this was error, and the judgment must be reversed.

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Brief for appellee.

Mayes & Longstreet, for appellee.

A study of the entire code of rules promulgated by the railroad commission of our state shows that the railroad commission had clearly in its mind the interests and the rights of both the shipper and the consignee. There is no question of *casus omissus.* Considering rule ten as a whole and paragraph by paragraph, it will be seen that it deals throughout with the questions arising between the shipper on the one hand and the railroad on the other and also has aspects toward the consignee.

The first paragraph of the rule provides for demurrage in favor of the railroad company as against the shipper, and because of the shipper's failure to load or to give proper instructions. The second paragraph provides for notice to be given by the railroad company to the shipper. The third paragraph prescribes the obligation of the railroad company to the shipper immediately to issue bill of lading and to ship out the car; and default in these duties is expressly declared to raise a liability to the shipper. Then comes the fourth paragraph which, after the declaration as above, in express terms of a liability to the shipper for failure to start the car on its trip within the period prescribed begins with the word, "likewise." It says, "likewise, when cars are detained in transit, one dollar per day will be charged for each day or fraction of a day," etc. Charged to whom? That the charge is to be in favor of the shipper is not only shown by the entire context of this paragraph, but also by the use of the insignificant introductory word, "likewise."

It is clear that the whole of the rule ten deals with the initiation of the shipment and it continuance over the route until its arrival at the point of delivery where the consignee is supposed to be. But the rule has no aspect whatever towards the dealing with a shipment at the point of destination or towards any dealing between the consignee and the railroad company.

The matter of the handling of the consignment at the point of destination and the matter of the reciprocal rights of the com-

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pany and the consignee are dealt with in rules one and seven and not in rule ten.

Learned counsel for appellant set forth the anomalous condition of affairs that would be produced if it were held that the rule of liability cannot be invoked by the consignee in that not the shipper, who may have been paid for his goods, but the consignee instead should be entitled to the penalties imposed by the rule on account of delayage. The argument of opposing counsel is however misleading, for it assumes that it is always the consignee who is the owner. As a matter of fact it is often the case that goods are shipped to the order of the shipper, and title does not shift until actual delivery to the consignee at place of delivery.

This suit was indubitably one brought for recovery of delayage and for recovery of one dollar per day penalty thereunder, and not for actual damages. And it is only on this view of the matter that the declaration is maintainable. The declaration has but one count, and even if that one count contained terms broad enough to base thereon a demand for damages at common law and also a demand for a penalty under the above rules of the railroad commission, it would be still demurrable under the decision of this court in *Illinois, etc., R. Co. v. Abrams,* 84 Miss. 456, 36 South. 542.

WHITFIELD, C. J., delivered the opinion of the court.

The declaration in this case is decidedly ambiguous as to what it means to count upon, whether the common-law liability, or the liability arising under that part of rule ten of the demurrage and delay rules, adopted by the railroad commission June 8, 1904, effective June 18, 1904, in which it is provided as follows. "Likewise where cars are detained in transit by being switched to some track between point of shipment and destination, one dollar per car will be charged for each day or fraction of a day of delay thus caused, and no free time in such cases be allowed." If there were nothing before us but the declaration

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itself, excluding the exhibits, then manifestly a demurrer predicated on the ground that such declaration contained two antagonistic clauses in one count—the whole declaration consisting merely of that one count—should be sustained on the authority of *Illinois, etc., R. Co. v. Abrams,* 84 Miss. 456, 36 South. 542. But the demurrer in this case does not present that ground, as we think, with sufficient clearness. There is certainly no ground of demurrer that can be said to present it, clearly or otherwise, unless it be the first ground, which may be called "the general welfare clause" of the demurrer, to wit, that "no cause of action is stated in said declaration." But, in addition to this want of clear presentation to the court below of this point, it is made manifest, through the whole course of the trial below and here, especially by the briefs on both sides, that no such ground for demurrer was presented to the court below, or passed on by the court below; and if we were to sustain the demurrer on this ground, we, an appellate court, would be sustaining the demurrer on a ground not passed on by the court below at all. We do not think this is fair to the court below.

But, turning now from this view of the question, considered by itself alone, we are bound to treat the declaration as if the exhibits were all set out on the face of the declaration. So, looking at the declaration, it is plain that the declaration, very inartificially drawn, if it intended to count on the violation of this rule ten alone, nowhere alleges that the delay was caused, in the language of that part of rule ten above quoted, "by cars being detained in transit, by being switched to some track between point of shipment and destination;" in other words, from all that appears from the declaration, aided by the exhibit, the suit may have been for a mere general delay, and not for the specific delay mentioned as arising from sidetracking cars in transit. If this last is the cause of action meant to have been counted upon, it was the easiest possible thing for the pleader to have so stated in the declaration; and since he did not so state, and since the pleading must be viewed on demurrer most strongly

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against the pleader, we think the demurrer was properly sustained on this ground alone. But we also think that the justice of this cause requires, in view of the course of the trial in the court below and here, that this cause should be remanded, with leave to amend pleadings so as to present the real ground relied on. Indeed, the chief object of this suit seems to have been to test the constitutionality of paragraph four, of rule ten, above set out, and also to determine the question whether the right of suit conferred by this paragraph can be availed of by the consignee. This last question was settled by the principles announced in *Yazoo, etc., R. Co. v. Keystone Lumber Co.*, 90 Miss. 391, 43 South. 605. We reaffirm, in their full extent, the principles announced in that decision, and those principles make it perfectly clear that this paragraph four of rule ten did embrace the right of action by a consignee in the case stated, or attempted to be stated, in this declaration, viewed as with exhibits attached.

It is said in the briefs for appellants, and it seems to be agreed to in the brief for appellees, that the court below held on this demurrer that this paragraph four of rule ten was not applicable to the case made by the declaration, because the consignee could not avail himself of said paragraph. If this was what was held by the court below, it was clearly error. We therefore hold, in this case, that paragraph four of section ten does embrace the consignee; but we further hold that the action of the court below was correct in sustaining this demurrer on the sole ground that the declaration does not aver that the delay sued for was delay caused by sidetracking the cars in transit between the point of shipment and destination. In view of the very confused state of the case, as presented by the declaration, and also in view of the failure on the part of the defendant to put its ground of demurrer clearly on the point we have indicated, and in view, also, as above stated, of the whole course of the trial below and here, it would certainly be unfair to the court below, as well as to the plaintiff, to deal with the demurrer as presenting to the

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Brief for appellant.

court below a ground not argued there or here and not clearly presented by the demurrer.

For this reason, the judgment of the court below in sustaining the demurrer is affirmed, solely on the ground above indicated; but the action of the court below in dismissing the suit is reversed, and the cause remanded with leave to both parties to plead further, as they may be advised.

Reversed.

WILLIAM B. GROCE v. PHOENIX INSURANCE COMPANY.

[48 South. 298.]

HUSBAND AND WIFE. *Conveyances between. Code* 1892, § 2294, *amended Laws* 1900, *ch.* 90, *p.* 130. *Code* 1906, § 2522. *Fire Insurance. Unconditional and sole ownership. Unacknowledged and unrecorded deed. Third party.*

An unacknowledged and unrecorded deed from a wife to her husband is valid as between the parties and is operative to invest the husband with title within the meaning of the "unconditional and sole ownership" clause of a fire insurance policy, the insurer not being a "third party" within the meaning of Code 1892, § 2294, amended Laws 1900, ch. 90, p. 130 (Code 1906, § 2522), providing that a conveyance of lands between husband and wife shall not be valid as against any third person unless in writing, ackowledged and recorded.

FROM the circuit court of Pike county.

HON. MOYSE H. WILKINSON, Judge.

Groce, the appellant, was plaintiff in the court below, and the insurance company, appellee, was defendant there. From a judgment in the defendant's favor plaintiff appealed to the supreme court.

The opinion of the court sufficiently states the facts.

R. W. Cutrer, for appellant.

Was the plaintiff at the time of the issuance of the policy,

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owner of the realty whereon the saw mill plant was located to the extent that he could legally institute and maintain this suit? It cannot be denied that plaintiff was in no way guilty of any fraud or wrongdoing, and that, from the time the policy was issued to the time of the fire he had taken reasonably prudent steps to protect the plant. And it is likewise undeniable that Groce never in any way misrepresented anything of a material nature relative to the risk. The fact that he had received from his wife, prior to the issuance of the policy, a warranty deed to the realty from his wife, which deed had not been placed of record, in no way changes matters in so far as the insurance company's liability is concerned.

The creditors and purchasers referred to in Code 1906, § 2522 (Laws 1900, ch. 90, p. 130) are those from the grantor in the instrument concerned, and the statute is intended to protect third parties dealing directly with the grantor. No creditors of Mrs. Groce, the grantor, are here complaining. *Sessons v. Reynolds,* 7 Smed. & M. 153; *Dixon v. Cook,* 47 Miss. 226; *Carlisle v. Fendall,* 49 Miss. 229; *Loughbridge v. Bowland,* 52 Miss. 558; *Chaffe v. Halpin,* 62 Miss. 1; *Green v. Weems,* 85 Miss. 566, 38 South. 551; George's Miss. Dig. 654 art. 14; *Morris v. Rucks,* 62 Miss. 76.

In a case construing an insurance policy containing the clause that: "If the interest of the assured in the property be other than an absolute fee-simple title it must be so represented to the company and expressed in the policy, else it will be void," this court held that such condition will not affect the right of the assured to recover on the contract of insurance if he has the sole beneficial ownership of the insured property, even though there may be a technical defect in his deed or an outstanding naked legal title held by another. *Liverpool, etc., Ins. Co. v. McGuire,* 52 Miss. 227. And, as reiterating this, see also *Phœnix Ins. Co. v. Bowdre,* 67 Miss. 620, 7 South. 596, 19 Am. St. Rep. 326.

It is undeniable that plaintiff is the only person having any sort of interest in or claim of ownership upon the insured prop-

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Brief for appellee.

erty. 1 Wash. Real Prop. 66, 67. May on Insurance, 289; Woods on Fire Insurance, 195, 196; 560.

Alexander & Alexander, on the same side.

Under the circumstances Code 1906, § 2522, is not here applicable. The term, "third person" in the statute refers only to persons in a position to be prejudiced by the secret conveyance or transfer. Here nobody except the insured or his wife could be the real owner of the property. She had conveyed to him, hence could not legally set up claim of title against him. Hence, as she had parted with her title to her husband, the insurance company could in no way be prejudiced. All that the insurance company can demand is to know that the insured is actually the true owner. *Imperial Fire Insurance Co. v. Dunham,* 117 Pa. 460, 2 Am. St. Rep. 686.

Price & Whitfield, for appellee.

As the land upon which the insured mill plant was located was in law the property of Mrs. Groce, in so far as appellee and other third parties were concerned, the contract of insurance was void. The policy distinctly avers that it shall be void if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee-simple.

That appellant's ownership was not absolute, under Code 1906, § 2522, is shown by the following excerpt from the testimony of appellant: "(Q.) Who is the owner of this land where the mill-plant was located? (A.) Mrs. J. B. Groce, my wife. She bought from Jesse Simmons. (Q.) Did you secure a title to this land at any time? (A.) I did before the machinery was located on the land. (Q). Where is that deed now? (A.) I cannot tell you. (Q.) When was that deed made? (A.) A few days prior to the purchase of the machinery. (Q.) Was it ever recorded? (A.) No, sir. (Q.) Who took the acknowledgement? (A.) It was not acknowledged. We did not think it necessary, being a family affair."

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It is shown by the evidence, and without contradiction, that Groce, the appellant, had never said a word to any one outside of his family about his wife's deed to him. Hence, under Code 1906, § 2522 (Laws 1900, p. 130, ch. 90), the land must be held to still belong to Mrs. Groce in so far as the appellee is concerned.

Accordingly the court below properly granted the peremptory instruction in favor of the insurance company. Elliott on Insurance, 257; *Liverpool, etc., Ins. Co. v. Cochran,* 77 Miss. 348, 26 South. 932; 19 Cyc. 689, 690, 691; *Rosenstock v. Miss. Home Ins. Co.,* 82 Miss. 674, 35 South. 309; *Montgomery v. Scott,* 61 Miss. 409.

Argued orally by *R. W. Cutrer* and *C. H. Alexander,* for appellant and by *Garland Q. Whitfield,* for appellee.

FLETCHER, J., delivered the opinion of the court.

This appellant, having insured certain sawmill property in the Phœnix Insurance Company and sustained a loss by fire, brought suit on the insurance contract. On the trial many defenses were interposed, presented by a variety of pleas and notices; but the course of the pleading and the evidence offered have eliminated from consideration every question except one, arising under section 2522 of the Code of 1906, which question may be thus stated: The policy of insurance contained the familiar stipulation to the effect that the policy should be void if "the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee-simple." On the trial of the case it developed that the land upon which the sawmill was located had been deeded to appellant's wife, and there was no conveyance of record divesting her title. It being clear, so far as the recorded deeds disclosed that the above-quoted stipulation in the policy had not been observed, the plaintiff, upon being reintroduced, testified that some days before the contract

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of insurance was effected, his wife had executed to him a deed conveying the title to the land in fee-simple, but that this deed had never been acknowledged or filed for record.

It was insisted on behalf of the insurance company that this deed is void under section 2522, of the Code of 1906, and, the circuit judge agreeing with this contention, a peremptory instruction was given for the defendant company. We desire to say in the outset that we unhestitatingly construe the agreement entered into by the parties at the second trial as submitting to the court only the question as to whether a peremptory instruction should have been given on the facts developed in the first trial, and decline to give this agreement the effect which would follow if both the law and the facts had been submitted to the court for decision. The statute in question reads as follows:

"*What Necessary to Validity of Conveyance.*—A transfer or conveyance of goods and chattels, or lands, or any lease of lands, between husband and wife, shall not be valid as against any third person, unless the transfer or conveyance be in writing and acknowledged and filed for record as a mortgage or deed of trust is required to be; and possession of the property shall not be equivalent to filing the writing for record, but, to effect third persons, the writing must be filed for record." Laws 1900, p. 130, c. 90.

The question is whether an insurance company, seeking escape from liability on the ground that the insured is not the sole and unconditional owner of the land on which the property is situated, can be held to be such a "third person" as the statute contemplates. It is very generally agreed, and, indeed, repeatedly decided in this state, that the clause in the insurance policy as to sole and unconditional ownership is reasonable and valid, and that a breach of such stipulation, unless waived by the company, will excuse the company from liability. There must be a reason for upholding and enforcing this stipulation, and the reason lies very near the surface. It is clearly and succinctly put by the Pennsylvania court in the following lan-

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guage: "The purpose of this provision is to prevent a party who holds an undivided, or contingent, but insurable, interest in property from appropriating to his own use the proceeds of a policy, taken upon the valuation of the entire and unconditional title, as if he were the sole owner, and to remove from him the temptation to perpetrate fraud and crime; for, without this, a person might thus be enabled to exceed the measure of an actual indemnity. But where the entire loss, if the property is destroyed by fire, must fall upon the party insured, the reason and purpose of this provision does not seem to exist." *Imperial Fire Ins. Co. v. Dunham,* 117 Pa. 460, 12 Atl. 668, 2 Am. St. Rep. 686.

This view of the purpose of the clause must be kept in mind in giving effect to its provisions, and in applying it to any given state of facts. It was doubtless in the mind of the court when there was decided the case of *Liverpool, etc., Ins. Co. v. McGuire,* 52 Miss, 227, in which it was held that the clause had to do, not with nice questions of title, to be precisely determined, but with beneficial, practical, and equitable ownership; and therefore the court held that, though the legal title was in a partnership, yet it was competent to show by parol that the partnership had been dissolved and the real estate divided. And, again, in *Phœnix Ins. Co. v. Bowdre,* 67 Miss. 620, 7 South. 596, 19 Am. St. Rep. 326, the court reaffirmed with emphasis and elaboration the doctrine of the *McGuire case,* and upheld the policy, although the deed to the insured was so defective that the legal title had probably not passed. After a most searching analysis of the purpose of this clause in insurance policies, the court concludes: "Applying these principles to the case at bar, we will see that plaintiffs are the sole, undisputed, beneficial owners of the property in question, holding under a conveyance purporting to invest them with an estate in fee-simple. The truth is, so far as this record discloses, plaintiffs are the only persons on earth having any sort of interest in or claim of beneficial ownership to premises. There is, at the utmost, a mere naked legal

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Statement of the case.

title outstanding in one of the three surviving executors of Merriweather, and this executor is the mere trustee of the title for these very plaintiffs and their brothers and sisters; all of said brothers and sisters having conveyed their undivided interests to these plaintiffs. Will any one deny that plaintiffs might not, if thought necessary to protect their title, go into a court of chancery and immediately have the naked legal title divested out of the trustee and invested in themselves? The appellees are the real owners of the premises, they are the sole owners asserting title, an they must bear the total loss involved in the destruction of the building, unless we shall hold the company liable.

The authorities are all agreed that a conveyance, though void at the instance of creditors, because executed fraudulently, is not to be held void against a claim by the insured for the value of the property, though covered by an insurance policy containing the identical stipulation here under review. *Steinmeyer v. Steinmeyer,* 64 S. C. 413, 42 S. E. 184, 59 L. R. A. 319, 92 Am. St. Rep. 809; *Rochester Loan & Banking Co. v. Liberty Ins. Co.,* 44 Neb. 537, 62 N. W. 877, 48 Am. St. Rep. 745.

The statute under review does not render absolutely void all unacknowledged and unrecorded conveyances between husband and wife. They are perfectly good as between the parties. They are void only as to "third persons." That this expression "third persons" does not apply in all its literal significance seems clear from the case of *Green v. Weems,* 85 Miss. 566, 38 South. 551. It would certainly be true that if the expression is to be held to embrace all persons whatsoever, without regard to their interest in the property conveyed or the possibility of their being injuriously affected by the transfer, it would include all creditors, whether secured or unsecured. But this case holds correctly that when creditors are involved the reference is to secured creditors only, following the analogy of another statute dealing with conveyances. This case cannot be reconciled with the view that all third persons are meant, inde-

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pendent of the power of the conveyance to do them mischief. We cannot attach significance to the solitary word "otherwise," used in one sentence of the opinion, after mention of creditors and purchasers. That usually innocuous word cannot be extended to include a class excluded by the reasoning and effect of the opinion. We must look to the purpose of the statute.

No sound reason can be given for requiring conveyances between husband and wife to be recorded, except that the world may know as to the change of ownership. If any given individual has not been prejudiced by this secret conveyance, how can his lack of knowledge possibly operate to his injury? The insurance company is not affected in its risk or its liability by the fact that constructive notice was not given of the conveyance. It is only interested in knowing that the party claiming to be owner is in fact the owner, and that nobody else is. Now in the case at bar either Groce or his wife is the real owner. Manifestly Mrs. Groce is not, since she has, as Groce testifies, conveyed the property by a deed admittedly valid as to her. She has no interest in the proceeds of insurance, no claim on the property. We cannot see that the insurance company could possibly have been prejudiced by the failure of the husband to have the deed acknowledged and recorded, and we further hold that the statute includes only such "third persons" as are in a position to be prejudiced by the secret conveyance. We intimate nothing as to the value of the proof offered to establish the execution of the deed, since that is a question for the jury.

Reversed and remanded.

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FREDERICK SWITZER v. EDGAR BENNY.

[47 South. 401.]

SUPREME COURT. *Jurisdiction. Suit begun in justice's court. Amount in controversy. Appeal. Code* 1906, § 86.

Under Code 1906, § 86, authorizing an appeal from the circuit court to the supreme court in cases originating in a justice of the peace court only where the amount in controversy exceeds fifty dollars, the supreme court has no jurisdiction of and will dismiss an appeal in a case so originating where the amount in controversy does not exceed said sum, although the parties have agreed that the record should be so amended as to formally show that the amount exceeded said sum.

FROM the circuit court of Harrison county.

HON. WILLIAM H. HARDY, Judge.

Switzer, appellant, was plaintiff in the court below; Benny, appellee, was defendant there. From a judgment in defendant's favor plaintiff appealed to the supreme court.

The opinion of the court states the facts upon which the appeal was dismissed.

J. H. Mize and *Gex & Harrison,* for appellant.

W. R. Harper, for appellee.

FLETCHER, J., delivered the opinion of the court.

This cause originated in the court of a justice of the peace about a cow worth $20, as shown by the affidavit in replevin and the officer's return on the writ. When the case got to the circuit court, it was decided on a certain issue, and the parties, manifestly desiring to appeal to the supreme court, agreed according to a recital in the record that the affidavit in replevin should be so amended as to show that the cow was worth $51. It is clear, therefore, that the jurisdiction of this court is made to

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depend, not upon the real amount in controversy which is unquestionably only $20, but upon an agreement as to what the affidavit shall recite; this agreement being, of course, entered into to escape the peremptory terms of section 86 of the Code of 1906. We cannot sanction such practice. It is obvious that the amount in controversy does not exceed $50, and we are therefore without jurisdiction. Jurisdiction cannot be conferred on a court by consent of parties.

The appeal is therefore dismissed.

TOWN OF WOODVILLE v. CHESTER H. JENKS.

[48 South. 620.]

SUPREME COURT. *Constitutional Law. Constitution* 1890, *sec.* 147. *Reversals forbidden in certain cases. Removal of causes from chancery to circuit courts.*

Under Constitution of 1890, sec. 147, providing that the supreme court shall not reverse a decree of the chancery court or judgment of the circuit court on the ground of a want of jurisdiction to render the judgment or decree from any error or mistake as to whether the cause in which it was rendered was of equity or common-law jurisdiction, the supreme court, there being no other error, can only affirm the decree or judgment appealed from, and, in the absence of all action on the subject by the court in which the suit was begun, cannot order the removal of a cause from the one court to the other.

FROM the chancery court of Wilkinson county.

HON. J. S. HICKS, Chancellor.

Jenks, appellee, was complainant in the court below, and the town of Woodville, appellant, was defendant there. From a decree overruling its demurrer to complainant's bill the defend- and appealed to the supreme court.

The appellee's bill alleged that the town of Woodville, be-

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Brief for appellant.

cause of services performed by him as an engineer superintending the construction of a water works and electric light plant, was indebted to him in the sum of $2,025, compensation claimed by him at five per centum on the contract price of the plant; less the credits mentioned in the bill. The bill alleged that "inasmuch as the dealings between complainant and defendant are voluminous, and extend over a period of several years, the court should state an account and fix the liability of the defendant to the complainant." The prayer of the bill was that an account should be stated and that the town be required to pay over to complainant whatever sum of money might be found to be due complainant by defendant. The defendant demurred to the bill assigning as a ground that a court of equity was without jurisdiction, since the suit was in assumpsit. In the supreme court the appellant contended that the chancery court erred in overruling appellant's demurrer, and in failing to transfer the case to the circuit court.

Bramlette & Tucker, for appellant.

The account sued on was not a mutual account. The appellee's claim is one in assumpsit. Hence the chancery court is without jurisdiction. *Abbey v. Owens,* 57 Miss. 297; *Barnard v. Sykes,* 72 Miss. 297, 18 South. 450; *Adams v. Cotton Mills,* 89 Miss. 865, 43 South. 65.

It may be contended that inasmuch as the chancery court has assumed jurisdiction, the supreme court, under the state constitution, section 147, will not reverse the decree, under the ruling of *Cazeneuve v. Curell,* 70 Miss. 521, 12 South. 32. But if this be true, the chancery court should, *sua sponte,* have transferred the case to the circuit court, for our constitution, section 162, provides that this shall be done in cases where the circuit court has exclusive jurisdiction. Hence, if the supreme court does not dismiss the bill, the case should be, under appropriate order of this court, remanded to be transferred to the circuit court.

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Opinion of the court.

In addition to the mandatory section 162 of our Constitution or rather in aid of it, we insist that the appellant is entitled to a trial by jury, an inalienable right confirmed by section 31 of our Constitution. Hence, if the bill be not dismissed on this appeal, further proceedings below should be in the circuit court.

FLETCHER, J., delivered the opinion of the court.

The demurrer interposed to the bill in this case raises no question, except that the cause is of common-law, and not equity, cognizance. The chancery court, however, overruled the demurrer, thereby taking jurisdiction. Under section 147 of the Constitution of 1890 this court is powerless to reverse for this cause. Nor do we think we are authorized, as urged by counsel, to enter an order here transferring the cause to the circuit court. Such a procedure is for the chancery court.

Affirmed.

DAY LUMBER & MANUFACTURING COMPANY v. CITIZENS' BANK.

[48 South. 727.]

JUDGMENT BY DEFAULT. *Entry of appearance. Several defendants. No process served on one. Order of court.*

In a suit against several defendants, upon one of whom there was no valid service of process, a judgment by default cannot be maintained against the one not served predicated alone of an order of the trial court allowing "defendants" time within which to plead, although taken after the expiration of the time allowed.

FROM the circuit court of Hancock county.

HON. WILLIAM H. HARDY, Judge.

The Citizens' Bank of Poplarville, appellee, was plaintiff in the court below; the Day Lumber & Manufacturing Company, appellant, and several others were defendants. From a judgment by default against all of the defendants the Day Lumber & Manufacturing Company appealed to the supreme court.

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Brief for appellant.

Service of process was had upon all of the parties defendant except the Day Lumber & Manufacturing Company. The order of court upon which it was sought to predicate the judgment against appellant was as follows:

"In this cause it is ordered that the defendants be allowed sixty days in which to plead to the declaration, as of this term." The judgment appealed from was rendered at a term of the court subsequent to the one at which the order was made.

Will A. Parsons, for appellant.

It is elementary law that before judgment by default can be rendered against any party, the record, of which the judgment is a part, must show that such party has been properly served with process of the court rendering the judgment, if the suit originated in such court. *Potts v. Hines,* 57 Miss. 736; *Ingersoll v. Ingersoll,* 42 Miss. 155; *Erwin v. Carson,* 54 Miss. 282; *Moody v. McDuff,* 58 Miss. 751; *Gibson v. Currier,* 83 Miss. 234, 35 South. 315.

The officer's return must of itself show sufficiently that proper service was made. *Rankin v. Dulaney,* 43 Miss. 197; *Hargus v. Bowen,* 46 Miss. 72; *Campbell v. Hays,* 41 Miss. 581; *Dogan v. Barnes,* 76 Miss. 568, 24 South. 965.

Where service of process is to be made upon a corporation, service must be made upon its representative agent or officer. It is a general rule that in a suit against a corporation it must appear of record that the person on whom the process was served was, at the time, occupying such a relation to the corporation that the service could be legally made upon him. 19 Ency. Pl. & Pr. 654; 22 Am. & Eng. Ency. Law (1st ed.), 175; *Williams v. Downs,* 30 Tex. 51; *Botsford v. O'Connor,* 57 Ill. 72; *Haley v. Hannibal, etc., Railroad Co.,* 80 Mo. 112.

In the case of *Southern Express Co. v. Hunt,* 54 Miss. 664, this court held that the return of the officer, where it showed service on an agent of an express company under the laws of 1873, was insufficient unless it also showed the facts which

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made service upon such agent legal. See also *Lamb v. Russell*, 81 Miss. 382, 32 South. 916.

Appellant is a Louisiana corporation, as shown in the declaration. No notice was mailed to appellant, as required by Code 1906, § 920, providing that judgment by default shall not be taken until thirty days after dates of the filing of the notice.

Shivers & Shivers, for appellee.

We do not deny the correctness of the law quoted by learned counsel for appellant, and we admit that, if the return of process alone be looked to, this court would hold the default judgment invalid. But there are other ways whereby a party defendant may be brought within the jurisdiction of the court than by the service of process. For instance, a voluntary appearance of a defendant will waive necessity for service of process upon him. *Solomon v. Compress Co.*, 70 Miss. 822, 12 South. 850; *Memphis, etc., R. Co. v. Glover*, 78 Miss. 467, 29 South. 89.

As the record discloses an order allowing all of the defendants named in the declaration a time certain wherein to plead, it must be held that appearance was entered for all of the defendants.

FLETCHER, J., delivered the opinion of the court.

It is conceded by appellee that the service of process in this case will not support a judgment by default; but it is insisted that appellant entered an appearance in the cause, which cures the defect in the service. Doubtless this view of the law is correct; but the trouble is that there is no evidence in the record to show that this particular appellant entered such appearance. The appearance was manifestly entered by the other defendants, sued jointly with appellant; but it is too clear for argument that this appearance cannot affect appellant.

Reversed and remanded.

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Brief for appellants.

HENRY BRANNON ET AL. v. LEWIS V. PRINGLE.

[47 South. 674.]

TAXATION. *Tax deeds. Filing for redemption. Clerk need not actually indorse. Code* 1906, § 4338.

It is not essential to the validity of a tax deed that the chancery clerk should have marked it "Filed" when the collector deposited it with him under Code 1906, § 4338, requiring the collector to file all conveyances of land sold for taxes in the chancery clerk's office, there to remain, subject to redemption, for two years from the sale.

FROM the chancery court of Jackson county.

HON. THADDEUS A. WOOD, Chancellor.

Pringle, appellee, was complainant in the court below; Brannon and others, appellants, were defendants there. From a decree in complainant's favor, defendants appealed to the supreme court.

The first opinion of the court, delivered by CALHOON, J., sufficiently states the facts.

C. H. Wood, for appellants.

The tax deed under which Pringle claims title was never filed for record. There was, accordingly, no full compliance with Code 1892, § 3823, and Pringle acquired no title under the tax deed. *Vasser v. George,* 47 Miss. 713; *Bank v. Louisville, etc., R. Co.,* 72 Miss. 447, 17 South. 7.

The tax deed which was in evidence shows of itself that it was never marked filed. In fact, learned counsel for appellees seem to rely solely upon the *prima facie* effect of the existence of the tax deed. But this is overcome by recitals of the deed itself, which is of course the best evidence.

Deny & Deny, on the same side.

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Opinion of the court.

H. B. Everett, for appellee.

That the tax deed was not filed for record is no ground for reversal. No law required it to be marked filed, and the presumption is that it was lodged with the clerk for the two years' period of redemption. It is so alleged in the bill, and is not denied in the answer, and there was no evidence that it was not lodged with the clerk for the two years' period.

It must accordingly follow that the decree of the court below must be affirmed. *Hardie v. Chrisman,* 60 Miss. 671; *Chrisman v. Currie,* 60 Miss. 858; *Bell v. Gordon,* 55 Miss. 45.

CALHOON, J., delivered the following opinion of the court, the one first rendered in the case, but afterwards vacated:

This voluminous record consists of an original and amended bill and answers and cross-bills and answers to cross-bills, etc., all of which are grounded on the original proceeding by Pringle to confirm his alleged tax title to lands. One of the points for the defense is that the tax deed under which he claims was never filed for record. That instrument is itself in evidence, and does not show that it ever had been marked "Filed" by the clerk, as required by section 3823, Ann. Code 1892, which is the same as section 4338, Code 1906. This section requires that the tax collector "shall file all conveyances of land sold to individuals in the office of the clerk of the chancery court of the county on or before the first Monday of April, there to remain for two years from the day of sale, unless the land be sooner redeemed," and providing that the owner might redeem it within two years by paying the clerk, etc. It will be seen that the question is whether these tax conveyances shall be marked "Filed" by the clerk, or whether they may be simply deposited with him, and whether this mere deposit will be a compliance with the statute. It will be noticed that these conveyances are not to be recorded, but simply "filed" in the office of the clerk.

In order to ascertain the legislative intent, it must be observed that under section 2457, Ann. Code 1892, being the same as sec-

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tion 2787, Code 1906, it is provided, in referenec to conveyances, mortgages, etc., that they shall be void as to all subsequent purchasers for value without notice, unless "lodged with the clerk of the chancery court of the proper county, to be recorded," etc.; and that by section 2458, Code 1892, being the same as section 2788, Code 1906, "every conveyance, covenant, agreement, bond, mortgage and deed of trust shall take effect, as to all purchasers for a valuable consideration without notice, and as to all creditors, only from the time when delivered to the clerk to be recorded." It is plain that the intent was that where the requirement is simply to "lodge for record," or to "deliver to the clerk," recording was designed, and it was not intended that there should be necessarily a marking of the paper "Filed" by the clerk; but it seems to us that there was another intent in the requirement that the tax conveyances should be by the collector "filed in the chancery clerk's office." Of course, we understand the signification of the word "filed" in the lexicographies, and its derivation from the word "filum," being a thread, indicating the form of practice of putting papers on a thread for preservation and in order that they might be readily found; but under the modern authorities we think there is a more enlarged meaning attached, and that manual indorsement is now necessary in cases where the documents are left in a public office, not for record, but for safe-keeping and reference.

Be this as it may, for the reasons heretofore given, we are of opinion that, under our statute, the tax conveyance must be absolutely marked "Filed" by the clerk, with the date of filing, as a memorial by which it may be ascertained exactly at any time whether or not the two years allowed for redemption have expired, or when they will expire. We therefore think, without going further into this case, that the original and amended bills must be dismissed, and the decree of the lower court reversed, all of which is accordingly now decreed, and it necessarily follows that all the proceedings appendant must fall with the original and amended bill. *Reversed.*

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Opinion of the court.

H. B. Everett, for the appellee, after the delivery of the foregoing opinion, suggested error therein, placing great emphasis on the fact that the tax deed was *prima facie* evidence of a proper tax sale, and especially relied upon. *Wheeler v. Ligon,* 62 Miss. 560.

WHITFIELD, C. J., delivered the opinion of the court in response to the suggestion of error.

Section 4338, Code 1906, provides that "the tax collector shall file all conveyances of land sold to individuals in the office of the clerk of the chancery court of the county on or before the first Monday in April, there to remain for two years from the day of sale, unless the land be sooner redeemed." Construing this provision, it was held in the original opinion in this case that it was essential that the clerk should mark the deed "Filed," and that since this deed, or a certified copy of it in the record, did not show any such marking "Filed" by the clerk, the instrument was void. Our late Brother CALHOON, who delivered the opinion, himself examined this suggestion of error, and called the attention of the other members of the court to the fact that he thought the suggestion was properly taken and should be maintained, saying he had overlooked the case of *Wheeler v. Ligon,* 62 Miss. 562.

The court as at present organized has again carefully considered the suggestion of error, and we are satisfied that the suggestion of error is well taken. Certainly it was decided in *Wheeler v. Ligon* that the failure of the tax collector to file with the chancery clerk the conveyance did not vitiate such conveyance and it was further decided in that case that under section 526, Rev. Code 1880, the presumption that section provides attached to the filing of such tax deed with the chancery clerk. The statute (section 4338, Code 1906) itself provides that the tax collector shall file the deed. It does not say that the clerk shall file it. It will not do to say that the clerk shall mark it "Filed," that it may remain a memorial by which it may be as-

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Statement of the case.

certained whether the time for redemption has expired, for the reason that the time for redemption is two years from the day of sale, not from the day of filing; and if the object in having the tax collector file the conveyance is simply to lodge it in the proper custody, as seems to us the true construction, then manifestly the mere marking of the deed "Filed" by the clerk could effect nothing as to that intent.

It follows that the suggestion of error is sustained, the former judgment in the case vacated and set aside, and a judgment of affirmance now entered.

Affirmed.

RAMSEY A. ROBERTS v. GEORGE THOMAS.

[48 South. 408.]

HOMESTEADS. *Right to acquire. Head of family. Widower. Temporary absence of children.*

A widower upon moving to this state does not forfeit a right to acquire a homestead here by temporarily leaving his children in school at the place whence he came.

FROM the chancery court of Jackson county.

HON. THADDEUS A. WOOD, Chancellor.

Thomas, appellee, was conplainant in the court below; Roberts, appellant, was defendant there. From a decree in complainant's favor defendant appealed to the supreme court.

The suit was instituted to cancel defendant's claim of title to land claimed by complainant as his homestead; the defendant's claim of title thereto was predicated of an execution sale of the land made by the sheriff of the county, under an execution against complainant, subsequently to complainant's occupation of the premises as a homestead. The property was of less value than the maximum value of a homestead exemption allowed by law to the head of a family. The opinion of the court further states the facts.

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Brief for appellant.

May & Sanders, for appellant.

The learned chancellor in the court below erroneously adopted the view that the unexecuted intention of appellee to bring his children, at some time in the future, from their domicile in Georgia to reside with him on the property in controversy had the effect of rendering the property exempt from execution. We insist, however, that in order for property to be consecrated to homestead uses it must first be actually baptised by the physical living presence of the family thereon. The intent of placing the family on the premises at some time in the future is not sufficient.

Even if appellee cherished the intent to place his family upon the property, such intent was never manifested by any outward signs. It is shown in evidence that appellee came alone to Mississippi, bought and lived alone upon the property in controversy; made no effort to place his family thereon, and notified no one of his claim thereto as a homestead; incurred indebtedness and failed to pay the same; had a just judgment rendered against him from which he took no appeal; and, subsequently, when the judgment creditor now seeks to have recourse against him, appellee seeks in turn to evade the payment of this just debt by hiding his property under the protecting cover of our homestead exemption laws. The situation is entirely different from the case of a freeholder, head of a family, living with his family upon a homestead and claiming exemption of the homestead from execution sale by reason of his actually occupying the premises with his family.

Under our statutes on the subject, it must be held that a previous occupancy of the premises by the head of the family and also his family, is necessary for one to claim homestead exemption. *Campbell v. Adair,* 45 Miss. 170; *Hand v. Wynn,* 52 Miss. 784; *Vigneaud v. Dean,* 77 Miss. 860, 27 South. 881; *Christy v. Dyer,* 81 Am. Dec. 493.

The homestead exemption is given to every "citizen, male or female, being a householder and having a family." Code 1906,

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§ 2146. A family, within the meaning of the statute law, embraces a collective body of persons living together in one house or within the curtilage, and having the relation of parents and children or other close ties of blood. *Wilson v. Cochran,* 98 Am. Dec. 553; *Prior v. Stone,* 70 Am. Dec. 348; 15 Am. & Eng. Ency. Law (2d ed.), 541; *Pearson v. Miller,* 71 Miss. 379, 14 South. 731.

Denny & Denny, for appellee.

That appellee was the head of a family and a householder at the time of the execution sale of his homestead is shown beyond question by the evidence. The chancellor has so found, and, in view of the decisions of this state, such finding should not be disturbed. *Pearson v. Miller,* 71 Miss. 379, 14 South. 731; *Nelson v. State,* 57 Miss. 286; Thompson on Homestead and Exemption, 49; 9 Am. & Eng. Ency. Law (2d ed.), 804, 806.

When the appellee became a citizen of Jackson county, he, as a householder and head of a family, was entitled to his homestead exemption rights. The appellee's home was the home of his two infant children although the children had not been brought from Georgia. *Lessly v. Phipps,* 49 Miss. 790; *Letchford v. Carey,* 52 Miss. 791; *Hinds v. Morgan,* 75 Miss. 509, 23 South. 35; *Martin v. Martin,* 84 Miss. 533, 36 South. 523.

The sale of appellee's homestead was clearly void, and the chancellor could not do otherwise than cancel the sale. It was not necessary for the appellee to place his children upon the premises to make it exempt by law from execution.

The cases cited by appellant are not in point.

FLETCHER, J., delivered the opinion of the court.

George Thomas, the appellee, a widower, moved to Mississippi from Georgia some three years ago, and bought a house and lot upon which he actually resided. He had two boys who remained behind in Georgia, boarding with their grandfather and attending school; their board and tuition being paid by the

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father. The father testifies that he was holding the place where he lived as a home for himself and boys, who would rejoin him as soon as they finished their school course.

The sole question is whether Thomas had a right to hold this house and lot as a homestead against a purchaser at an execution sale. It will readily be conceded under all the authorities that appellee was the head of a family, and that he could send his children away from home to attend school without forfeiting his right to the homestead, provided he continued to reside in the home. It is difficult to see how the case can be different merely because the boys, who are temporarily absent at school, have never actually and physically resided in the home, provided there is always present their intention to do so as soon as their school days are over. The authorities cited for appellant are not in point. Mere occupancy certainly is not sufficient; but, when that occupancy is coupled with residence, citizenship, and the status of being the head of the family, the right is perfect, and cannot be defeated because the children have chosen to remain at school when the father removed rather than go through the useless ceremony of coming to Mississippi for a while, and then returning to their school duties.

The learned chancellor held correctly, and the decree is *affirmed.*

ROBERT N. DAY ET AL. v. VIOLA TUCKER.

[48 South. 742.]

1. TAX SALES. *Infants. Redemption. Suit in chancery.*

An infant, whose land has been sold for delinquent taxes, may sue in the chancery court to redeem the same from the tax sale without waiting to become twenty-one years of age.

2. APPEALS. *Demurrer to bill in equity. Interlocutory decree overruling.*

An appeal from a decree overruling a demurrer to a bill in equity is not a matter of right; its allowance is discretionary and should not be granted where it can only serve to delay the cause.

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Brief for appellants.

FROM the chancery court of Scott county.

HON. JAMES L. MCCASKILL, Chancellor.

Viola Tucker, appellee, was complainant in the court below; Day and others, appellants, were defendants there. From a decree overruling their demurrer to the bill defendants appealed to the supreme court.

The complainant, Mrs. Tucker, an infant, suing by her husband and next friend, charged in her bill that she inherited an undivided one-half interest in the land in suit from her parents, and that during her ownership the land had been sold for delinquent taxes. The bill as amended derainged title from the United States government, through successive grantors, to complainant's parents from whom she inherited. The land was wild and uncultivated and no improvements had been made upon it by the defendants or others since the tax sale. Complainant paid to the clerk of the chancery court one-half the money necessary to redeem the entire land, and the bill prayed a redemption of complainant's undivided half interest therein from the tax sale.

The defendants demurred to the amended bill, assigning especially that the right of redemption could not be exercised by complainant before she became twenty-one years of age. The court overruled the demurrer and defendants appealed to the supreme court.

Green & Green, for appellants.

Under Code 1892, § 3823, applicable when the land was sold for taxes, appellee failed to make proper tender of taxes. Her tender was not to the appellants but to the chancery clerk of the county. There is no statute authorizing the clerk to have anything to do with the redemption of lands sold for taxes after the delivery of the tax-deed. The requirement of the statute law is that persons under disability shall redeem by payment not to the chancery clerk but to the purchaser of the land at tax sale. *Price v. Ferguson,* 66 Miss. 407, 6 South. 210; *Em-*

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Brief for appellee.

mons v. Myers, 7 How. (Miss.) 375; *Walker v. Brown,* 45 Miss. 616.

The right of redemption attaches only after the disability of minority is removed. Code 1892, § 3823, saves to minors the right to redeem the land "within two years after attaining full age . . . from any purchaser thereof." The general limitation is of two years, and during that period the right of redemption is general and for the benefit of whomsoever it may concern. After the expiration of this period the right is special, and is confined to those under disability at the time of the sale. With regard to minors the provision is that a right is saved to them to redeem within two years *after* attaining full age. *Metcalf v. Perry,* 66 Miss. 68, 5 South. 232; *Day v. Smith,* 87 Miss. 395, 39 South. 526; *Mills v. Adams,* 71 Miss. 150, 14 South. 462.

William I. McKay, for appellee.

Whatever defects existed in the original bill were cured by the allegations of the amended bill. Proper tender was made and proper deraignment of title in appellee was shown thereunder. It was proper for the appellee to make tender of the necessary amount to the chancery clerk rather than to the appellants. The clerk is the proper custodian and receiver of all funds necessary to be paid into court.

This court has always recognized the right of infants to redeem their lands from tax sales before the removal of their disabilities. *Price v. Ferguson,* 66 Miss. 404, 6 South. 210; *Wilson v. Sykes,* 67 Miss. 617, 7 South. 492.

MAYES, J., delivered the opinion of the court.

The bill states a perfect cause of action, and the demurrer thereto was properly overruled. The mistake made by the chancellor was in allowing the appeal. As held in the case of *Fire Ins. Co. v. Morrison,* 48 South. 178, and appeal from a decree overruling a demurrer is not a matter of right, but is dis-

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Statement of the case.

cretionary with the chancellor. To allow an appeal in this case was an abuse of discretion, since it is manifest that it could serve no purpose except to delay the cause.

Affirmed and remanded.

ALBERT BACOT v. STATE OF MISSISSIPPI.

94 225
d95 154

[48 South. 228.]

CRIMINAL LAW AND PROCEDURE. *Intoxicants. Unlawful sale. Beverage. Ignorance no excuse.*

Where intoxicating liquors are sold as a beverage the seller cannot escape liability for an unlawful sale by showing that "the goods" were guaranteed by the wholesaler from whom he purchased to be non-intoxicating and that he made the sale honestly so believing.

FROM the circuit court of Pike county.

HON. MOYSE H. WILKINSON, Judge.

Bacot, appellant, was indicted and tried for the unlawful sale of intoxicating liquors, convicted, fined, sentenced to imprisonment, and appealed to the supreme court.

The evidence for the state showed that appellant sold a beverage, kept by him in a barrel in his store, called "Phosphate;" that it intoxicated those who drank it. The appellant did not deny selling the beverage, but testified that during the time he sold it he did not know that it was intoxicating in its effects. As evidence of his good faith he sought to show that he had been guaranteed by its manufacturers that the drink was non-intoxicating, but the court declined to admit such evidence. Defendant being a witness in his own behalf was asked, by his counsel: "Would you intentionally sell any liquors that were intoxicating?" The question was objected to by the state and, over appellant's protest, he was not allowed to answer it. This action of

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the circuit court, and its refusal of instructions relative to the good faith of appellant in selling what he believed to be non-intoxicating liquors, were assigned as error in the supreme court.

Clem V. Ratcliff, for appellant.

The court below erroneously excluded evidence offered by the appellant to show that he did not know of the intoxicating effect of the beverage which he sold. He should have been allowed to show in evidence the indisputable facts that the stuff was sold to him to be dispensed as a beverage, pure and simple, that it was manufactured by the Jackson Vinegar Company of Jackson, Mississippi, was guaranteed by its manufacturers not to be intoxicating, and that he was protected by his guarantee.

The following instruction was asked by appellant and was refused by the circuit court: "The court instructs the jury that although they may, from the evidence, believe that the phosphate was intoxicating, yet they cannot convict the defendant unless they believe from the evidence beyond all reasonable doubt that the defendant knew that the phosphate was intoxicating at the time he sold it." The refusal of this instruction was fatal error, because the intent is the essential element in any unlawful act which makes it a crime. And the question of appellant's intent was one to be settled by the jury. *King v. State,* 58 Miss. 737; *Bertrand v. State,* 73 Miss. 51, 18 South. 545; *Goode v. State,* 87 Miss. 495, 40 South. 12.

George Butler, assistant attorney-general, for appellee.

The law punishes the selling of intoxicating liquors, in counties where its sale is prohibited, and the fact that the seller can, in good faith, claim that he was ignorant of the intoxicating effect of such liquors, makes no difference in his guilt. It is obligatory upon one who sells beverages of any kind, in such counties, to see to it that "the goods" are not intoxicating.

I am not unmindful of the many cases of our state cited by learned counsel for appellant; but examination of them will show that in each of the cases the sale was by a druggist or mer-

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Opinion of the court.

chant who, in each case, sold the intoxicant in good faith as a *medicine* and not as a *beverage*. In the instant case the appellant does not claim to have sold his "phosphate" as a medicine.

FLETCHER, J., delivered the opinion of the court.

This case is totally unlike the cases of *King v. State,* 58 Miss. 737, 38 Am. Rep. 344; *Bertrand v. State,* 73 Miss. 51, 18 South. 545, and *Goode v. State,* 87 Miss. 495, 40 South. 12, cases dealing with the sale of compounds to be used exclusively for medical purposes. In that class of cases the substance was not offered for sale as a beverage, but as a medicine, and the good faith of the merchant was properly in issue. But in this case the so-called "phosphate" was kept for sale and sold as a beverage, and in such cases the seller must take the risk and bear the consequences if the fluid dispensed is in fact intoxicating. Aside from the well-known exception in the case of pharmaceutical preparations, the law punishes the fact of selling intoxicants, regardless of the intent of the seller. He must see to it that the beverages he dispenses are non-alcoholic to the extent that intoxication in any degree will not be produced by even excessive consumption of the beverage. The circuit court was correct in excluding evidence and refusing instructions relative to the good faith of the appellant.

We take occasion to say that the sale of intoxicating liquors, although disguised under unusual names and unfamiliar labels, will not be encouraged by this court.

Affirmed.

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GEORGE CUNNINGHAM v. STATE OF MISSISSIPPI.

[48 South. 297.]

CRIMINAL LAW AND PROCEDURE. *Separation of jury in murder case. Effect.*

A conviction of murder will not be set aside because one of the jurors separated himself from his fellows during their deliberations, where it is highly improbable that he was communicated with during the separation.

FROM the circuit court of Monroe county.

HON. EUGENE O. SYKES, Judge.

Cunningham, appellant, was indicted and tried for the murder of Polly Johnson, was convicted and sentenced to the penitentiary for life, and appealed to the supreme court.

One of the grounds assigned in appellant's motion for a new trial was predicated of the fact that during the deliberation of the jury and before rendition of the verdict one of the jurors separated himself from his fellows. The testimony of the bailiff showed that when the jury had retired for the night, during their deliberation, he was awakened from sleep, about two o'clock at night, by the re-entry into the jury roon of Juror Grady; that he did not know when the juror left the room; that no officer accompanied him when he separated himself from his fellows; that the juror, in answer to witness's inquiry, stated that he had left the jury room to obey an urgent call of nature and that he had only gone a few feet for that purpose, and had preferred not to awaken witness who was asleep when he departed.

There was no evidence that any one had communicated with the juror, or that his temporary separation from his fellows in any way affected the result of the case.

George C. Payne, for appellant.

Under the decision of *Skates v. State,* 64 Miss. 645, 1 South. 843, the verdict was clouded by the separation of the juror,

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Opinion of the court.

Grady, from his fellow jurymen. The juror left the jury-room without permission and without the bailiff's knowledge. No one save himself knew whither he went, how long he stayed away from the jury-room, and whom, if anyone, he met while absent.

When the appellant proved, as he did, the absence of the juror, it devolved upon the state to offer evidence in explanation of the absence; and as the state failed to do so, the judgment based upon the clouded verdict, should be reversed and the case remanded.

George Butler, assistant attorney-general, for appellee.

The facts in evidence overwhelmingly show that the appellant was guilty of a most shocking murder. Appellant contends that he should have been granted a new trial because of the separation of one juror from the others while they were spending the night in charge of their bailiff. But the evidence submitted on the hearing of appellant's motion for a new trial was merely that the juror, Grady, at about two o'clock in the early morning, felt the urgent calls of nature, and, without awaking the sleeping bailiff, stepped out of the jury room and went only about fifteen steps when he necessarily went no further. After he finished relieving his physical necessities, he promptly returned, awoke the bailiff and told him of the occurrence; and this is all of the evidence in the matter. At the unseemly hour of the night, there could have been no probability of the juror's meeting or talking with anyone. Nor was the action of the juror open to suspicion. *Skates v. State,* 64 Miss. 645, 1 South. 843; *Martin v. State,* 71 Miss. 87, 14 South. 530; *Nunnery v. State,* 87 Miss. 542, 40 South. 431.

FLETCHER, J., delivered the opinion of the court.

We do not think the proof as to separation of the juror Grady from his fellows is sufficient to reverse this case. It was said in *Skates v. State,* 64 Miss. 645, 1 South. 843, 60 Am. Rep.

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Brief for appellant.

70, that it is not enough for the defendant to show that possibly some person might have been with the juror and communicated with him. In the case at bar it is highly improbable that the juror saw anybody during the period of his enforced withdrawal from the body of the jury.

Though we are earnestly urged to reverse the case on the facts, after a careful consideration of the evidence, we do not feel justified in disturbing the verdict of the jury.

Affirmed.

MARY B. LONG v. STATE OF MISSISSIPPI.

[48 South. 726.]

CRIMINAL LAW. *Continuance. Absence of defendant.*

A judgment of the circuit court in a criminal case dismissing an appeal from a justice's court, because of defendant's absence, is erroneous where she departed from the court upon the case being continued for the term, and her counsel had been unable after reasonable efforts to advise her of a subsequent order setting aside the continuance.

FROM the circuit court of Yazoo county.

HON. WILEY H. POTTER, Judge.

Mary Belle Long, appellant, was convicted before a justice of the peace for unlawfully selling cocaine and appealed to the circuit court. From the judgment of the circuit court dismissing her appeal to that court she appealed to the supreme court.

The opinion of the court states the facts.

Holmes & Holmes, for appellant.

There was a clear understanding between counsel for appellant and the learned district attorney that for good reasons the appellant's case should be continued. The learned judge of the court below was informed of the agreement, and practically

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consented to it. The reasons why the district attorney agreed to the continuance are now immaterial. It is sufficient to quote from the statement made by the learned trial judge of the court below: "There has been no kind of misrepresentation in this respect." The district attorney also says: "My recollection is that the conversation as to continuance took place between counsel for defendant and myself exactly as the counsel for defendant has stated it." Now, we concede that if the appellant had failed to appear in the circuit court, it could have tried her case *de novo* in her absence, or have dismissed her appeal and directed a writ of *procedendo* to the justice of the peace court, or entered a forfeiture on her bond. *Thomas v. State,* 68 Miss. 91, 8 South. 647; *Henning v. State,* 69 Miss. 214, 12 South. 559; *Ex parte Caldwell,* 62 Miss. 774. But there was no abandonment of the appeal in this case. There was no failure to prosecute it. There was no default of any kind upon appellant's part. No claim can be made that appellant's attorneys were not diligent in her behalf.

George Butler, assistant attorney-general, for appellee.

The only question for consideration here is whether or not there has been an abuse of a sound judicial discretion on the part of the court below such as will warrant interference by this court.

Notice to appellant's counsel was notice to her. Her father lived near Pocahontas in a neighboring county. Her counsel knew she was at Pocahontas on Monday preceding the dismissal of the cause on Friday. It is a matter for this court to determine whether appellant failed to obtain her full rights in the court below. *Belew v. State,* 47 South. 862; *Roberts v. Port Gibson,* 89 Miss. 75, 42 South. 540.

FLETCHER, J., delivered the opinion of the court.

This case originated in the court of a justice of the peace and was appealed to the circuit court. In that court it was agreed

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between the district attorney and the counsel for the defendant that the case should be continued. This agreement was reported to the circuit judge, who made an entry to that effect on the trial docket. Thereupon the defendant was notified by her attorney that she could go home, and that she would not be needed until the next term of court, and the witnesses were discharged. It seems that the district attorney, in making this agreement, acted under a misapprehension as to the attitude of counsel. The circuit judge, for reasons satisfactory to himself, set aside the order of continuance within two hours after it was made, and promptly notified defendant's counsel that the case would be tried at that term of court. It appears that the attorneys made a reasonable effort to get word to their client, but failed to do so, and on the last day of the term, some week and a half after the order of continuance was set aside, appellant's case was called, the appeal dismissed, and a writ of *procedendo* issued to the justice's court.

We are not able to resist the conclusion that injustice was done the appellant by this proceeding. Her attorneys show that they were unfamiliar with her place of residence, and both the mails and the telephone were employed in a vain effort to get into communication with her. We think the justice of the cause demands that the case be reinstated and tried on its merits.

Reversed and remanded.

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Brief for appellant.

SAXONY MILLS v. JOHN H. WAGNER ET AL.

[47 South. 899.]

1. ATTACHMENTS. *Nonresident defendants. Garnishments. Jurisdiction. Efforts to procure.*

The debtor of a nonresident cannot, without the consent and against the wishes of his creditor, deposit the sum due in a bank to the credit of a nonresident for the purpose and thereby confer jurisdiction of an attachment suit against the creditor on a court of the bank's domicile.

2. FOREIGN CORPORATIONS. *Process. Code* 1892, § 3433, *Laws* 1894, *ch.* 61, *p.* 49. *Doing business in state.*

A foreign trading corporation having no office or place of business in this state but employing a soliciting agent to obtain orders and send them to the home office, where they are filled by shipments direct to the purchasers, is not doing business in this state, within the meaning of Code 1892, § 3433, amended Laws 1894, ch. 61, p. 49, providing for the service of process on corporations; nor is its soliciting agent "an agent" upon whom process against it can be served.

FROM the circuit court of, second district, Yalobusha county. HON. SAMUEL C. COOK, Judge.

Wagner and others, copartners, doing business under the firm name Wagner & Company, appellees, were plaintiffs in the court below; the Saxony Mills, appellant, was defendant there. From a judgment in plaintiff's favor defendant appealed to the supreme court.

The opinion of the court states the facts.

Kimmons & Kimmons, for appellant.

No jurisdiction of the appellant was ever acquired, hence the judgment against appellant, and on which garnishment was issued, is void. Code 1892, § 133, fixes the jurisdiction of the court in attachment suits. The writ must be returnable to the

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Brief for appellant.

"court of a justice of the peace of any district, in cases within his jurisdiction, in which the defendant or property or debts of the defendant may be found." The appellant was a non-resident of the state, and had no property or business interests or debts owing it in Yalobusha county. The return of the constable shows that appellant was "not found" in the district. The service upon Reynolds, traveling salesman of appellant, could not give jurisdiction. The effort of Wagner & Company to create an indebtedness by depositing money in a local bank to the credit of the appellant, and obtain jurisdiction thereby cannot be countenanced. By an unbroken line of decisions, it is held that when a litigant seeks by fraudulent methods to acquire jurisdiction, his suit must fail. *Ball v. Sledge,* 82 Miss. 749, 35 South. 214; *Fenn v. Harrington,* 54 Miss. 733; *Griffin v. McDaniel,* 63 Miss. 121; *Ross v. Railroad Co.,* 61 Miss. 12.

In the cases above cited this court held that an honest belief on plaintiff's part that the amount in controversy was within the jurisdiction of the court, determined the jurisdiction; but the court also held, in each of the cases, that any effort on the part of plaintiff to evade jurisdiction of the court was fatal. And inasmuch as it was the evident purpose of the appellees, in the case at bar, by means of a subterfuge, to create conditions which would give the justice of the peace jurisdiction, the judgment of the court below must be reversed.

The service of process upon Reynolds, traveling salesman of appellant, conferred no jurisdiction, because it is undisputed that appellant was a foreign trading corporation having no office or place of business in the state, and employing Reynolds solely as a soliciting agent whose orders were sent to the home office of appellant in Missouri to be there filled by shipments directly to the purchasers. Under Laws 1894, ch. 61, p. 49, applicable to this case, appellant was not doing business" within the state of Mississippi, and the service of process upon Reynolds amounted to nothing in so far as any binding effect upon appellant was concerned. *St. Clair v. Cox,* 106 U. S. 350, 27 L. Ed.

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Brief for appellees.

222; *Insurance Co. v. Mansfield,* 45 Miss. 311; *Insurance Co. v. Holmes,* 75 Miss. 390, 23 South. 183; *Berger v. Pennsylvania Railroad Co.,* 9 L. R. A. (N. S.) 1214, note; *Maxwell v. Edens,* 65 Mo. App. 439; *Wilcox Supply Co. v. Masher,* 114 Mich. 64; *Rock Island Plow Co. v. Peterson,* 93 Minn. 356.

Certainly a mere soliciting agent employed by a foreign corporation which is not "doing business" in the state, cannot be held to be an "agent" of the corporation, within Laws 1894, ch. 61, p. 49. The word "agent," does not mean every man employed by the corporation, but refers to its principal officers exercising a controlling authority over its business. *Lake Shore, etc., Railroad Co. v. Hunt,* 39 Mich. 469; *Colt v. Sutton,* 102 Mich. 334.

I. T. Blount, for appellees.

A foreign corporation may be sued in this state, as an individual, when an agent of the corporation is found and served with appropriate process within the proper jurisdiction. Laws 1894, ch. 61, p. 49; Code 1892, § 3433; *Pullman Car Co. v. Lawrence,* 74 Miss. 782, 22 South. 53; *Illinois, etc., R. Co. v. Sanford,* 75 Miss. 868, 23 South. 355; *Georgia Home Ins. Co. v. Holmes,* 75 Miss. 390, 23 South. 183.

Aside from the service of process upon Reynolds, the writ of garnishment, served upon the Bank of Water Valley, gave the court jurisdiction inasmuch as the bank acknowledged having in its hands effects belonging to the Saxony Mills.

Our lawmakers have realized and recognized the necessity of requiring foreign corporations doing business in this state through agents here to submit to the jurisdiction of our state courts. Nowhere in our statutes is it required that a foreign corporation shall have a place of business here. The statute law relates "to the method of acquiring jurisdiction over such corporations here and holding them to answer here for the purposes of suit, judgment, executions, etc." *Illinois, etc., R. Co. v. Sanford, supra.*

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Opinion of the court.

FLETCHER, J., delivered the opinion of the court.

The appellant, a nonresident corporation, was sued in 1905 by the appellees in the court of Justice Mauldin at Water Valley for damages on account of a shipment of flour. The suit was by attachment, and in order that jurisdiction should attach it was necessary, under section 133 of the Annotated Code of 1892, that the defendant company "be found" in the justice's district or have property or debts in such district. It appears that Wagner & Co. were indebted to appellant in the sum of $832.50, and, for the evident purpose of conferring upon the justice of the peace jurisdiction of the attachment suit, Wagner & Co. deposited this sum of money in the Bank of Water Valley to the credit of the Saxony Mills, and thereafter sued out the attachment, alleging that the Bank of Water Valley was indebted to the Saxony Mills. The bank answered the writ of garnishment, stating that Wagner & Co. had made this deposit, which was still in the possession of the bank, but that the Saxony Mills repudiated the transaction, disclaimed any ownership of the fund, and declined to recognize the deposit. In addition to this procedure, the summons in attachment was served upon one Reynolds, a resident citizen of Water Valley, who was at the time a traveling salesman in the employ of the Saxony Mills. Reynolds seems to have accepted service and acknowledged that he was the agent of the appellant, and the officer so stated in his return. The appellant entered no appearance in the case, and judgment was taken in favor of Wagner & Co. as by default for the sum of $150, and the money in the bank was subjected to the payment of the judgment. It appears, however, that this fund was never so applied, but seems to have been paid to appellant. However that may be, it appears that in September, 1906, the judgment was unsatisfied, and upon suitable garnishment proceedings a debt due appellant by the Newburger Mercantile Company was sought to be subjected to the payment of the judgment. The sole defense interposed by the Saxony Mills is that the judgment rendered by Justice of the Peace Mauldin

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in 1905 is void, because that court never acquired jurisdiction. The circuit court held that the judgment was not void, and gave judgment against the garnishee in favor of appellees, and the Saxony Mills prosecuted this appeal.

It is insisted by appellant that the act of Wagner & Co., in depositing the money in the bank to the credit of the Saxony Mills was unsanctioned by the appellant and that jurisdiction could not thereby be conferred upon the court. We agree with this contention and have no difficulty in concluding that one indebted to a nonresident cannot place money on deposit in a bank, in defiance of his creditor's wishes, for the purpose of conferring jurisdiction in attachment upon the court where the bank is located. This judgment must be upheld, if at all, upon the theory that the nonresident company had actually been served with process within the jurisdiction of the justice of the peace rendering the judgment. This matter, however, originated prior to the adoption of the present code. We are not aided, in determining this question, by the provisions of sections 919 and 920, of the Code of 1906, and chapter 123, p. 132, of the Laws of 1908. These new statutes, undertaking to define what shall constitute "doing business" within the state and who are to be deemed agents of foreign corporations for the purpose of process, are not now before us. The case at bar is governed by the general rules of law on the subject and by chapter 61, p. 49, of the Laws of 1894, which provides:

"If the defendant in any suit or legal proceeding be a corporation, process may be served on the president or other head of the corporation, upon the cashier, secretary, treasurer, clerk or agent of the corporation, or upon any one of the directors of such corporation; or if the corporation be a sleeping car company, upon any conductor thereof; or if a steamboat company, upon the captain or other officer of a boat thereof. If no such person or persons be found in the county, then it shall be sufficient to post a true copy of the process on the door of the office or principal place of business of the corporation. In suits against

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railroads, sleeping car, telegraph, telephone, express, steamboat and insurance companies or corporations, or in suits against a receiver or receivers in charge of the property of any such companies or corporations, the process may be served on any agent of the defendant or sent to any county in which the office or principal place of business may be located, and there served as herein directed and authorized; or may be served on any one of the foregoing officers of such corporation or company, and upon the secretary, cashier, treasurer, clerk, depot agent, attorney or any other officer or agent of such receiver or receivers, or upon them in person. When any writ or process against such corporation, company, receiver or receivers has been returned executed, the defendant or defendants shall be considered in court, and the action shall proceed as actions against natural persons, and all process and notices to be served upon such companies, corporations or receivers, may be served as herein directed."

It will thus be seen that the statute makes special reference to railroads, sleeping car, telegraph, telephone, express, steamboat, and insurance companies, and provides for service of process upon such companies by serving any of their agents. It is clear that no difficulty can arise in such cases, because all such companies have offices in the state, pay taxes here, have important property interests which the law protects, and in most cases have made large and valuable investments within our borders. This is the class of corporations to which reference is made by Justice WHITFIELD in his concurring opinion in *Illinois, etc., R. Co. v. Sanford,* 75 Miss. 862, 23 South. 355, 942. But the appellant corporation does not fall within this class. It has no office or place of business in the state of Mississippi. It has its place of business elsewhere, and sends its traveling salesmen into this state, who take orders, which are transmitted to the home office and filled by shipment direct to the purchaser. The question is whether a court acquires jurisdiction of a case against such a nonresident corporation by serving process upon a traveling salesman. Is such an employee an

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"agent" of the corporation within the meaning of the statute above quoted? It is well settled that a corporation like the appellant company cannot be held to be "doing business" within the state, in the absence of a statute enlarging the usual significance of this well-known expression. It is hardly necessary to cite authority in support of this conclusion, as there is no intelligent dissent among the authorities. See the exhaustive note to *Berger v. Pennsylvania R. R. Co.* (R. I.), 9 L. R. A. (N. S.) 1214.

It is equally well settled that, in the case of a corporation which is not "doing business" in this state, service of process upon a mere soliciting agent is not sufficient. Such an employee is not an agent of the corporation within the meaning of the statute. It is accurately stated by the Michigan court that the word "agent" in a statute like ours does not mean every man who is intrusted with a commission or employment, but designates the principal officers of the corporation, who either generally or in respect to some particular department of the corporate business have a controlling authority, either general or special. *Lake Shore & Michigan Southern Ry. Co. v. Hunt,* 39 Mich. 469. It is said again that statutes providing for service of process upon an "agent" of a corporation are to be construed "to include only agents vested with some general authority and discretion, and not to extend to mere employees having no independent powers." 19 Ency. Pl. & Pr. 676; *Fairbanks v. Cincinnati & C. R. Co.,* 54 Fed. 420, 4 C. C. A. 403, 38 L. R. A. 271.

It follows from these views that the justice's court was wholly without jurisdiction to render the original judgment, and the same is absolutely void. Such being the case, the writ of garnishment against the Newberger Mercantile Company should have been quashed.

Reversed and remanded.

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WALTER BLACKWELL v. STATE OF MISSISSIPPI.

[48 South. 290.]

CRIMINAL LAW AND PROCEDURE. *Robbery. Indictment.*

An indictment is fatally defective if it charge only that the defendant represented himself to be an officer and threatened to arrest and imprison the prosecutor, and did then and there take and carry away the prosecutor's personal property, of designated value, given defendant by prosecutor through fear of injury to his person.

FROM the circuit court of, first district, Yalobusha county.

HON. SAMUEL C. COOK, Judge.

Blackwell, appellant, was tried and convicted of robbery, was sentenced to the penitentiary for seven years, and appealed to the supreme court.

The indictment against appellant, omitting its introductory formal parts, was as follows: "Walter Blackwell, late of the county and district aforesaid, on the 27th day of January, 1908, in said county and district, did then and there represent to H. B. Dobbins that he was an officer and watchman, and did then and there threaten to arrest the said H. B. Dobbins and put him in jail, and did then and there willfully and feloniously take, steal, and carry away the personal property of the said H. B. Dobbins, consisting of a suit case, the value of $4 and one suit of clothes, value $20, delivered to the said Walter Blackwell by the said H. B. Dobbins, through fear of threatened injury to his person by the said Walter Blackwell, said property being the property of H. B. Dobbins, against the peace and dignity of the state of Mississippi."

Wm. F. Hamilton and *W. P. Shinault,* for appellant.

The indictment fails to charge any offense. Merely representing one's self as an officer of the law and threatening to put

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another person in jail, and thereby obtaining, by trick or artifice, the property of another, will not support an indictment charging robbery. *Simmons v. State,* 28 South. 881. The indictment fails to charge that the property was taken from the person of Dobbins and in his presence. This omission is fatal. Code 1906, § 1361. The indictment fails to charge that the taking was against the wishes or without the consent of Dobbins.

George Butler, assistant attorney-general, for appellee.

The question here presented is whether, under the provisions of Code 1906, § 1361, impersonating a public officer and arresting a person and threatening to put him in jail, and thereby procuring from him possession of his property, constitutes robbery. Frankness compels the statement that we can find no case so holding, See, however, *Simmons v. State,* 28 South. 881; *Bussey v. State,* 71 Ga. 100; *Long v. State,* 12 Ga. 293; *Williams v. State,* 12 Tex. App. 240.

MAYES, J., delivered the opinion of the court.

We do not think any offense is charged under the indictment in this case. For this reason the judgment is reversed, indictment quashed, and the prisoner held to await the further action of the grand jury. *Reversed.*

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YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY v. WILEY H. HUGHES.

[47 South. 662.]

WAREHOUSEMEN. *Goods destroyed. Fire. Negligence. Burden of proof.*

In an action against a warehouseman for the value of goods destroyed in a fire which burned the warehouse, the burden is on the bailor-plaintiff, in the absence of proof as to the circumstances of the fire, to show that it resulted from the bailee-defendant's negligence.

FROM the circuit court of, second district, Bolivar county.

HON. SYDNEY SMITH, Judge.

Hughes, appellee, was plaintiff in the court below; the railroad company, appellant, was defendant there. From a judgment in favor of plaintiff defendant appealed to the supreme court.

The opinion of the court states the facts of the case.

Mayes & Longstreet, for appellant.

The court below should have granted the peremptory instruction requested by appellant. The facts indisputably show that appellant held the property solely as a warehouseman, and that while the property was thus held it was destroyed by fire without fault of appellant. The burden of proof was upon appellee, as bailor, to show neglect upon appellant's part. He failed as to this; hence the peremptory instruction asked for by appellant should have been granted. *Prince v. Alabama State Fair Ass'n,* 106 Ala. 340, 17 South. 449, 28 L. R. A. 716; *Knights v. Piella,* 111 Mich. 9.

While it is true that appellant, as a common carrier, contracted with appellee as to transportation of the goods, yet the evidence shows that this obligation upon appellant's part was satisfactorily fulfilled. When appellee left the goods in storage

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with appellant, a new obligation, that of warehouseman, arose upon the part of appellant. In other words, appellant had fulfilled its duty as a common carrier of property, and had entered upon an entirely different relationship at the time of the loss by fire.

The court below erred in instructing the jury peremptorily to find for the appellee as to appellant's liability. Even if the appellant's contract as a common carrier had not been fulfilled, but, as a carrier, it still had possession of appellee's goods at the time they were burned, even then the peremptory intruction in appellee's favor would have been improper, because, in such case, the appellant would have received the goods as baggage, had they not been destroyed. And since some of the goods were not, strictly speaking, baggage, and since the company's agent at Boyle did not know the true nature of the contents of the tool chest, the appellant could not legally be liable therefor. *Yazoo etc., R. Co. v. Georgia, etc., Insurance Co.*, 85 Miss. 7, 37 South. 500.

Jones & Hardee, for appellee.

Can a bailee for hire excuse himself from liability for loss of the goods entrusted to him, by merely showing that the goods were destroyed by fire? This is the main question in this case. Our court has held that if the circumstances surrounding a fire, in cases such as this, fail to show negligence on the part of the bailee, or want of proper care upon his part, it then devolves on the bailor to turn the scale by some evidence inculpatory of the defendant. The law does not intend to presume negligence. It does make the reasonable requirement of the bailee who fails to return the thing bailed, to show that he cannot return it, and why; and when he discloses fully the fact showing the impracticability of a return because of the destruction of the thing, with the attendant circumstances, and nothing connected with his showing in this respect inculpates him, the plaintiff must show liability or fail in his action. *Meridian Fair, etc., Ass'n*

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v. North Birmingham, etc., Railroad Co., 70 Miss. 808, 12 South. 555.

Under the foregoing decision of our court, the instruction in behalf of appellee and the verdict and judgment in the court below were correct. For there was absolutely no showing made by appellant disclosing the "attendant circumstances" of the fire.

FLETCHER, J., delivered the opinion of the court.

The appellee on July 3, 1907, purchased a ticket at Memphis, from the agent of the appellant company for Boyle, and on his ticket two articles of baggage were checked. One was a trunk filled with wearing apparel, and the other was a chest of carpenter's tools. The baggage reached Boyle in safety, and was stored in the station house of the railroad company. Three or four days after the baggage was so stored, appellee and the agent of the company had a conversation, in which it was arranged that appellee should leave his baggage in the appellant's wareroom for an indefinite time, paying storage thereon. The depot and its contents were destroyed by fire some time subsequent to this arrangement, and Hughes sued for the value of his baggage. The court gave a peremptory instruction in behalf of the appellee as to liability, leaving the jury the duty of ascertaining the damages. From a verdict for the appellee, the railroad company appealed.

The declaration in this case contained three counts. The first was framed upon the theory that the liability of the company was that of a common carrier; second, that the compnay was liable as a warehouseman, but had "carlessly" allowed the trunks and contents to be destroyed by fire, on a day named in the declaration; the third count, that the company was liable as a warehouseman, and that the defendant had "wrongfully, carelessly, and negligently failed and neglected to exercise and maintain that degree of care, prudence, and caution which it, as bailee for hire or warehouseman, was bound to exercise and

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maintain, wrongfully and inexcusably permitted the said chest and contents to be wholly lost and destroyed, to plaintiff's damage," etc. It is perfectly obvious that no liability rested upon the company as a common carrier, since its duty in that respect had ceased, and by special contract the railroad company had become liable as a warehouseman only. Indeed, appellee from the first placed no reliance in the first count of the declaration. Only one witness testified in the case, the appellee himself. He stated that he saw the trunks in the depot two or three days before the fire which destroyed the depot, and that the agent of the company at Boyle afterwards stated to him, appellee, that the trunks had been burned. The sole instruction given in the case recited: "The court instructs the jury to find for plaintiff, and to assess his damages at such amount as the proof shows the goods lost to have been reasonably worth at the time they were destroyed by the fire which consumed the depot at Boyle." This instruction, as well as the whole course of the trial, assumes that the goods were destroyed in the fire which consumed the depot, and we think this fact may be said to have been fairly established. It is clear, therefore, that the trial was had upon the second count, the one in which it was alleged that the property was destroyed by fire. On the trial the plaintiff showed the value of the articles lost, the delivery to the company, the contract of bailment, and, as we have shown, the fact that the property was destroyed by the fire that consumed the station. No evidence was introduced by the defendant, and there was no testimony from either side as to the circumstances and incidents of the fire. It is merely shown that the baggage was burned, and the railroad company relied upon this fact as a sufficient answer to the charge of nondelivery. The precise and narrow question, therefore, before the court for decision is as to where lay the burden of proof in the case; that is to say, was the fire presumably caused by the negligence of the appellant or was it presumably nonnegligent? Of course, the contract of bailment in this case was for the mutual benefit of the

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parties, and the warehouseman is therefore held to the exercise of ordinary care. The question is interesting and somewhat novel in this jurisdiction. We think our conclusion in this matter can best be stated by a consideration of a few authorities.

It appears that the ancient rule was that in all cases where a bailee was sought to be held no presumption of negligence arises on account of the loss of the goods, and the burden of proof is always on the plaintiff to establish that negligence was attributable to the bailee. But by the weight of modern authority this doctrine is substantially modified. It may now be said to be established that, when a bailor shows that goods are delivered to his bailee in good condition and are lost or destroyed or returned in a damaged condition, this fact creates a *prima facie* presumption of negligence; and it thereupon devolves upon the bailee to absolve himself from negligence. But the bailee may acquit himself of the charge of negligence by showing that the loss occurred from a cause which *prima facie* exonerates the bailee from negligence. "Thus, if he proves that the loss was occasioned by burglary, fire, the falling of the warehouse in which the goods were stored, the death of an animal bailed, . . . the burden is again shifted to the bailor to prove the defendant's negligence." 3 Am. & Eng. Ency. of Law (2d. ed.), 750.

Among the cases cited to support this declaration of the text is *Meridian Fair & Exposition Association v. North Birmingham Street Railway Co.*, 70 Miss. 808, 12 South. 555. In that case the fair association had become responsible to the owners for the safe return of a balloon borrowed by one Fisk, an aeronaut. This balloon while in the air took fire in some inexplicable manner, and was destroyed. On the trial Fisk, the only man who could have explained the accident, was not examined, and the spectators who testified could only say that the balloon suddenly took fire from a cause of which they were ignorant. The court says: "When a bailee in an action for nonreturn of an article shows that it was destroyed by fire under circum-

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stances fully disclosed, and not suggestive of any want of due care, it devolves on the bailor seeking to hold him responsible to turn the scale by some evidence inculpatory of the defendant. The law does not intend or presume negligence. It does make the reasonable requirement of the bailee who fails to return the thing bailed to show that he cannot return it, and why; and, when he discloses fully the fact showing the impossibility of a return because of the destruction of the thing, with the attendant circumstances, and nothing connected with his showing in this respect inculpates him, the plaintiff must show liability or fail in his action." It is true that the court observes that the circumstances were "fully disclosed," and that the rule there stated applies when the "attendant circumstances" are shown, but an examination of the facts of the case and the authorities upon which the decision is based convinces us that the mere fact of the property being destroyed by fire, in the absence of explanaion, *prima facie,* acquits the bailee of the charge of negligence; for in the *Meridian Fair Association case* the only person having knowledge of the facts was not examined, and the evidence of the spectators threw no sort of light on the question of negligence. Nothing was really disclosed in the proof except that the balloon was burned, and nobody knew how or why. The authorities cited by the court in the case throw much light upon the question. Reference is made to the note to *Schmidt v. Blood,* 9 Wend. (N. Y.) 268, 24 Am. Dec. 143. The rule is thus tersely stated on page 153 (9 Wend.) of the notes: "The doctrine deducible from these authorities seems to be this: A bailor seeking to recover from a warehouseman for the nondelivery of goods, or an injury thereto, must prove negligence. When he shows that the goods were not delivered on demand, or were delivered in a damaged condition, he has made a *prima facie* case. If the defendant accounts for the nondelivery or injury by showing that the goods were stolen or were lost or damaged by fire, or in any other manner consistent with the execrise of ordinary care on his part, the plaintiff's *prima*

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facie case is overcome, and he must prove positive negligence occasioning the loss." It will thus be seen that the court considers that a loss by fire may be perfectly consistent with the the exercise of ordinary care on the part of the bailee. In the note found on page 26 of Schouler on Bailments, it is said: "But if the bailee, under such circumstances, shows some cause of loss or damage to the thing, such as ought legally to excuse him, he need not go further and prove affirmatively that no negligence on his part operated in producing that cause; but may rest upon a showing which, on the face of it, leaves him sufficiently exonerated. The burden now shifts back to the plaintiff bailor, who is to overcome, if he can, the bailee's *prima facie* exoneration." This statement rests upon the case of *Memphis, etc., R. Co. v. Reeves,* 10 Wall. 176, 19 L. Ed. 909. It is true that this last-cited case was the case of a common carrier escaping liability on account of an act of God, and equally true that fire is not one of these causes, but the principle is applicable to the case at bar, since the question there being treated is one of presumptions. We can find no clearer or more accurate statement of what we conceive to be the true rule than the one made by the great Judge MCCLELLAN in *Higman v. Camody,* 118 Ala. 267, 20 South. 482, 57 Am. St. Rep. 33, in which he says: "In an action by a bailor against a bailee for the destruction of or injuries to the chattel while held under the bailment through the negligence of the latter, the burden of proof shifts from one side to the other, and rest with plaintiff or the defendant, upon the development of the circumstances in the evidence. It is, of course, on the plaintiff to show the bailment, that the defendant took the property under it, and returned it in a damaged condition, or did not return it at all. It is also, it seems, with him to show the condition of the chattel when it was delivered to the defendant. If the property was in good condition for the uses of the bailment, and it is not returned, or returned in an injured state, or if though there be an infirmity or defect in the chattel, but the injury sustained by it is not of a character at-

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tributable to such defect (as, for instance, where a leaky boat is let, and is injured by an explosion of gunpowder), the burden is on the bailee, since in either of the cases the injury would not have happened in the ordinary course of things had he been duly prudent and diligent, not, indeed, to acquit himself of all negligence, but to show a cause producing the injury which *prima facie* did not arise or result from or operate on account of a want of ordinary care on his part. This being done, the burden shifts back to the plaintiff to affirmatively show some causal negligence on the part of the defendant. To illustrate: The hirer of a boat loses it in a storm of sufficient severity to have probably caused the loss without fault on his part. He acquits himself of negligence *prima facie* by showing these facts, and throws the onus on the latter to prove that, notwithstanding the storm, the boat would not have been lost but for defendant's negligence in going out in the storm, or, being out, his want of care and diligence in handling the boat; and in such case it is with the plaintiff to reasonably satisfy the jury by a preponderance of evidence that not the storm alone, but the failure of the defendant to act with prudence and diligence in view of the storm, caused the loss." Some of the authorities do not subscribe to the doctrine that there is any shifting of the burden of proof, but this variance in logical method does not affect the result so far as practical ends are concerned.

A typical case of the sort just referred to is *Claflin v. Meyer*, 75 N. Y. 260, 31 Am. Rep. 467. It is there said: "It will be seen as the result of these authorities that the burden is ordinarily upon the plaintiff alleging negligence to prove it against a warehouseman who accounts for his failure to deliver by showing a destruction or loss from fire or theft. It is not, of course, intended to hold that a warehouseman, refusing to deliver goods, can impose any necessity of proof upon the owner by merely alleging as an excuse that they have been stolen or burned. These facts must appear or be proved with reasonable certainty. Nor do we concur in the view that there is in these

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cases any real 'shifting' of the burden of proof. The warehouseman, in the absence of bad faith, is only liable for negligence. The plaintiff must in all cases, suing him for the loss of goods, allege negligence and prove negligence. This burden is never shifted from him. If he proves the demand upon the warehouseman and his refusel to deliver, these facts, unexplained, are treated by the courts as *prima facie* evidence of negligence; but if, either in the course of his proof or that of the defendant, it appears that the goods have been lost by theft, the evidence must show that the loss arose from the negligence of the warehouseman." The rule has been accepted in a great number of jurisdictions. Thus it has been held in California: "A *prima facie* case of negligence is made out against a warehouseman who refuses to deliver property stored with him upon proof of demand and refusal. Such evidence alone is sufficient to show a conversion by him. But, if it appear that the property, when demanded, was consumed by fire, the burden of proof is then on the bailor to show that the fire was the result of the negligence of the warehouseman." *Wilson v. So. Pac. R. Co.*, 62 Cal. 164.

It has been held in Missouri: "The petition does not allege any negligence on the part of defendants, but alleges delivery of the goods to the defendants, and a failure to deliver on demand. Therefore, when plaintiff showed the delivery of the malt to defendants for storage under a contract with them for hire, and the failure by defendants to deliver on demand, it made out a *prima facie* case of negligence on the part of defendants; but, when the defendants showed that the goods were lost and damaged by the act of God, the burden shifted to the plaintiff to establish that the loss or damages was due to the want of the exercise of ordinary diligence and care in taking care of, and in failing to remove, the malt to a place of safety before the collapse. In *Lancaster Mills v. Merchants' Cotton Press Co.*, 89 Tenn. 1, 14 S. W. 317, 24 Am. St. Rep. 586, it is said: 'The rule, as we understand it, is that the burden of proof is

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upon the bailor to prove the contract and delivery of goods, then upon the bailee to show their loss and the manner of the loss. The burden then shifts to the bailor to establish that the loss was due to negligence.' *Runyan v. Caldwell,* 7 Humph. (Tenn.) 134. In *Wiser v. Chesley,* 53 Mo. 547; *Kincheloe v. Priest,* 89 Mo. 240, 1 S. W. 235, 58 Am. Rep. 117; *Taussig v. Schields,* 26 Mo. App. 318, and *Arnot v. Branconier,* 14 Mo. App. 431, exemption from liability by the bailee was not claimed upon the ground of the intervention of irresistible force, and those cases are in that respect distinguishable from the case at bar, and not in conflict with what has been said in this case." *American Brewing Association v. Talbot,* 141 Mo. 674, 42 S. W. 679, 64 Am. St. Rep. 538. That the "irresistible force" in the case there considered happened to be such as arose from an "act of God" canot affect the principle. In the case of *Stewart v. Stone,* 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215, the facts and the holding of the court are thus succinctly stated in the syllabus: "Plaintiff and his assignors entered into an agreement with defendant, by which the latter agreed to manufacture cheese and butter from milk delivered at his factory by the former, to sell the products, and distribute the proceeds in the manner stipulated. The factory was thereafter destroyed by fire, and a quantity of milk, butter and cheese thereby lost. In an action to recover the amount of the loss, held, that the contract was one of bailment, and defendant assumed simply the duty to exercise ordinary care to protect and preserve the property; that the burden was upon plaintiff to show a failure to perform that duty; and that no presumption of negligence arose from the fact that the loss resulted from the fire." We call special attention to the significant utterance of the court that the destruction of property by fire raises no presumption of negligence. *Cumins v. Wood,* 44 Ill. 416, 92 Am. Dec. 189, is an Illinois case. In that state there has always been an emphatic assertion of the rule that the burden of proof is upon the bailee to acquit himself of negligence when goods

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properly stored have been destroyed; but in this case there is a clear recognition of the further rule that, when the loss is shown to have resulted from fire, the burden has been met, and it therefore devolves upon the plaintiff to show that the fire was the result of defendant's negligence. See, also, 16 Am. & Eng. Ency. Law (1st ed.), 448; Jones on Pledges, §§ 411, 413; *Lamb v. Camden & Co.*, 46 N. Y. 271, 7 Am. Rep. 327; *Prince* v. *Alabama State Fair*, 106 Ala. 340, 17 South. 449, 28 L. R. A. 716; *James v. Orrell*, 68 Ark. 284, 57 S. W. 931, 82 Am. St. Rep. 293; *Knights v. Piella*, 111 Mich. 9, 69 N. W. 92, 66 Am. St. Rep. 375, and note. Cases which seem to announce a contrary rule will be seen, we believe, to be readily distinguishable on their particular facts. *Shafer v. Lacock*, 168 Pa. 497, 32 Atl. 44, 29 L. R. A. 254, a Pennsylvania case, may be taken as an illustration. But in that case the facts show that the fire resulted from the negligence of the workmen, who in repairing a roof had permitted sparks to escape from a fire pot used by them. The holding rests upon the statement in Shearman & Redfield on Negligence, §§ 59, 60: "When a thing which causes the injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care." But in the instant case it cannot be said that the fire which caused the injury was an agency under the control of the defendant company or any of its agents or employes. Some of the authorities, very properly, as we think, in discussing the question of presumptions, attach importance to the consideration that negligence will not be presumed in a case where the fire destroyed the property of the bailee, as well as the goods deposited for safe-keeping, and, applying this test, it is evident here that the railroad company lost its depot in the fire which destroyed the baggage, and presumably its loss was considerable. Learned counsel for appel-

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Statement of the case.

lee do not call our attention to any authority except the *Meridian Fair Association case,* which we have considered, *supra,* in support of their contention. Indeed, they seem to concede that the weight of authority in other states is against him. But he asserts that reason and common sense require that the person in possession of evidence should be compelled to produce it. This argument is not convincing in the light of the overwhelming weight of authority the other way. Indeed, there ought to be no difficulty on the part of the plaintiff in showing something of the origin and circumtances of this fire. The agent, or whoever was in charge of the station, is doubtless available as a witness. We intimate nothing as to the quantity of proof as to negligence which will suffice to warrant the submission of this case to the jury, or which will call for an explanation by the defendant. We only hold that, in the absence of proof as to the circumstances of this fire, the defendant was improperly held to be *prima facie* negligent, since the destruction of property by fire is entirely consistent with ordinary care.

Reversed and remanded.

ADOLPHUS A. BEASLEY v. SOPHIA A. COTTRELL.

[47 South. 662.]

MOTION TO DISMISS APPEAL. *Appeals. Limitation. Code* 1906, § 3112.

An appeal to the supreme court is barred and will be dismissed on motion, if nothing save the execution of a bond be done in the way of perfecting it before the expiration of the two years allowed therefor by the statute of limitations. Code 1906, § 3112.

FROM the chancery court of Clay county.

HON. JOHN QUITMAN ROBBINS, Chancellor.

Mrs. Cottrell, appellee, was complainant in the court below; Beasley, appellant, was defendant there. From a final decree in complainant's favor defendant appealed to the supreme court.

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Brief for appellee.

The final decree in favor of complainant, Mrs. Cottrell, was rendered May 16, 1906. Bond for appeal was filed in the court below May 16, 1908, but a citation for appellee was not issued until November 14, 1908, nor was the transcript of the record received by the clerk of the supreme court until November 19, 1908.

Appellee moved a dismissal of the appeal.

John G. Millsaps, for the motion.

The motion to dismiss must be sustained. Code 1906, § 3112, requires that the appeal from the judgment or decree complained of must be brought within two years' time. The appeal bond was filed one day too late, as it should have been filed on May 15 instead of May 16, 1908, to come within the two years' period. But aside from this, the bond alone was filed May 16, 1908, no citation for the appellee being even issued until November 14, 1908. Nor was the transcript of the record of the court below sent to this court until some days later.

This court has held that the mere filing of the appeal bond within the two years is not sufficient. *Chambliss v. Wood,* 84 Miss. 209, 36 South. 246, hence the motion to dismiss should be sustained and the appeal dismissed.

Leftwich & Tubb, contra.

The motion of appellee to dimiss the appeal is dependent upon the construction of Code 1906, § 3112, providing that "appeals to the supreme court shall be taken within two years next after the rendition of the judgment or decree complained of." The decree, from which appeal is sought, was rendered May 16, 1906, hence the appellant had all of May 16, 1908, wherein to file appeal bond; because the two years' period did not begin to run until May 17, 1906. Hence the appeal was taken in time. See Code 1906, § 1606, touching the computation of time.

Certificate of the clerk of the court below is attached to our

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brief showing that citation was not issued and served on the day the appeal bond was filed, for the reason that he had recently become an incumbent of the position, this being the first appellate matter coming before him in his term of office as clerk of the chancery court, and that he did not know the requirements relative to procedure in appeal from the chancery court. It would accordingly be a harsh thing for this court to enforce the rule laid down in *Chambliss v. Wood,* 84 Miss. 209, 36 South. 246, when appellant was not to blame for the clerk's failure to issue the citation within the proper limit of time.

FLETCHER, J., delivered the opinion of the court.

While the appeal bond in this case was given within the two years mentioned in the statute, yet the citation was not served upon the appeal, nor was the transcript filed in this court within two years next after the rendition of the judgment. Under the authority of *Chambliss v. Wood,* 84 Miss. 209, 36 South. 246, we are compelled to sustain this motion, and dismiss this appeal. So ordered.

ABNER D. SMITH v. STATE OF MISSISSIPPI.

[49 South. 113.]

CRIMINAL LAW AND PROCEDURE. *Vinous and Spirituous liquors. Malt liquors. Variance.*

Under an indictment charging defendant only with having unlawfully sold vinous and spirituous liquors, he cannot be convicted of having unlawfully sold a malt liquor.

FROM the circuit court of Lincoln county.

HON. MOYSE H. WILKINSON, Judge.

Smith, appellant, was indicted and tried for unlawfully selling vinous and spirituous liquor, was convicted, fined $500 and

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Brief for appellant.

sentenced to imprisonment in the county jail for ninety days, and appealed to the supreme court.

The indictment, after the formal prerequisites, averred that the appellant on a certain date "did then and there wilfully and unlawfully sell and retail vinous and spirituous liquors, he, the said Smith, not having authority so to do, contrary to the statute in such case made and provided, and against the peace and dignity of the state of Mississippi." The opinion of the court states the facts.

A. C. & J. W. McNair and *Luther L. Tyler,* for appellant.

The indictment did not use the comprehensive term, "intoxicating liquor," nor did it charge the selling of a "malt liquor." According to the testimony introduced by the state, the article sold was beer. The court below assumed that beer was in every case either spirituous or vinous. Code 1906, § 1746, under which the indictment is drawn, provides that "if any person shall sell or barter . . . any vinous, alcoholic, malt or intoxicating or spirituous liquors, or intoxicating bitters, or other drinks, which if drank to excess will produce intoxication, in any quantity less than one gallon, without a license therefore, . . . he shall, on conviction, be fined . . . or imprisoned . . . or both." It is manifest from the wording of this statute that the legislature had in view the distinction between the different kinds of liquor upon which the ban was to be placed; otherwise that body might have been content with the words "vinous" and "spirituous." The addition of the words, "alcoholic, malt or intoxicating bitters, or other drinks" show clearly the intention to signify by plain language that such liquors as were neither spirituous or vinous, in the usual acceptation of these words, were not to be prohibited. *Brantley v. State* (Ala.), 8 South. 816.

Some courts have held that "beer," without qualification, is a "malt" liquor, and therefore within the controlling sphere of a statute prohibiting the sale of malt liquors. Other courts

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Brief for appellee.

draw a distinction between "beer" and "lager beer," holding that the court should judicially know that the latter is a "malt" liquor. The argument sustaining the view that "beer" is not "malt" will be found in 90 Ala. 647, 8 South. 855; 24 Fla. 363, 5 South. 8; 120 Ill. 71, 60 Am. Rep. 549. The weight of authority is that beer is neither a spirituous nor a vinous liquor, 17 Am. Eng. Ency. Law (2d ed.), 200. See also *Reyfelt v. State*, 73 Miss. 415, 18 South. 925.

The state, in this case, did not charge that the appellant sold intoxicating or alcoholic liquors, it merely charged appellant with selling spirituous and vinous liquors and the proof failed to conform to the allegations of the indictment. *Boswell v. State* (Miss.), 12 South. 446; *Tyler v. State*, 69 Miss. 395, 11 South. 25.

George L. Butler, assistant attorney-general, for appellee.

The indictment charged that the appellant wilfully and unlawfully sold and retailed vinous and spirituous liquors. The proof shows that one Hiram Case, purchased of appellant, two bottles of Schlitz beer. No point was made in the court below as to any variance between the indictment and the proof. The court instructed the jury that if from the evidence they should find beyond a reasonable doubt that appellant "unlawfully and wilfully sold beer to Hiram Case," etc., then appellant must be found guilty.

It will be seen by reference to Code 1906, § 1746, that the sale of any kind of liquors, which if drank to excess will produce intoxication, is prohibited, and, in addition, that the legislature has absolutely prohibited the sale of certain designated liquors, such as vinous, alcoholic, malt or spirituous liquors; and it is perfectly manifest that the sale of any of these designated liquors is a violation of the law, whether they be intoxicating or not.

Code 1906, § 1761, provides that in any indictment under the Dram Shop Chapter, it is not necessary to aver the particular kind of intoxicating liquors sold. Hence, it is sufficient to

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allege generally a sale of intoxicating liquors, and it would, of course, be perfectly competent, under such an indictment, to prove the sale of any of the liquors designated in the statute, or any other kind of liquors, which, if drank to excess, would produce intoxication.

The thing condemned by the statute law is the illegal sale of intoxicating liquors. The authorities are practically unanimous in holding that "beer," without any descriptive word, is presumed to be intoxicating. 7 Ency. Ev. 675.

It is, however, insisted by learned counsel for appellant that even if beer is intoxicating, yet inasmuch as the indictment does not allege generally a sale of intoxicating liquors, the instruction granted for the state was fatal. This would, however, be at most a variance between the indictment and the proof. If the evidence, whereof the instruction is predicated, had been objected to because of a variance, the indictment could have been amended so as to conform to the proof. There is no contention that appellant was in any way surprised or prejudiced by this variance.

As showing the trend of our decisions in cases such as this, we cite *King v. State,* 58 Miss. 737; *Lemly v. State,* 70 Miss. 241, 12 South. 22. See also *State v. Giersch,* 98 N. C. 720.

FLETCHER, J., delivered the opinion of the court.

The indictment in this case charges appellant with the sale of "vinous and spirituous liquors." It is to be particularly noted that there is no use of the comprehensive term "intoxicating liquors," nor is there any charge of selling "malt liquors." The proof tended to show that appellant sold two bottles of what purported to be beer, but the witnesses did not taste the substance. The court charged the jury, at the instance of the state, that if the jury believed that the defendant sold beer to the witness Case a verdict of guilty should be returned. It is impossible to uphold this conviction in the light of the allegations of the indictment. The state did not charge, as it might

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Brief for appellant.

have done, that defendant sold alcoholic or intoxicating liquors. It elected to select two particular varities of intoxicating liquors, spirituous and vinous, and the proof must conform to the allegations. There can be no serious doubt that beer, as commonly prepared, is a malt liquor, as distinguished from spirituous and vinous liquors. *Boswell v. State* (Miss.), 12 South. 446. The question is analogous to the one involved in *Tyler v. State,* 69 Miss. 395, 11 South. 25, in which it was held that, if the indictment undertakes to do the unnecessary thing of setting out the persons to whom the sale was made, then proof must conform to the allegations in these particulars.

Reversed and remanded.

RICHARD T. SCHERCK v. JOSEPH L. MOYSE.

[48 South. 513.]

STATUTE OF FRAUDS. *Code* 1906, § 4775(c). *Option to buy land. Sufficiency of memorandum. Parol evidence. Loss of profits. Recovery.*

A writing, simply reciting that for a money consideration the defendant gave plaintiff a limited time within which to purchase from him a designated number of acres of timbered lands, lying in two specified counties of the state, at a named price per acre, is:—

(a) Insufficient under the statute of frauds; and

(b) Parol evidence is inadmissible to supplement its deficiencies; and

(c) Plaintiff cannot recover, under a declaration which fails to contain the necessary averments of a declaration in a common-law action for fraud and deceit, a loss of profits which he would have made by a resale of the lands but for defendant's breach of the supposed contract.

FROM the circuit court of Pike county.

HON. MOYSE H. WILKINSON, Judge.

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Brief for appellant.

Schreck, appellant, was plaintiff in the court below, and Moyse, appellee, was defendant there. From a judgment sustaining defendant's demurrer to the declaration, plaintiff appealed to the supreme court.

The opinion of the court states the facts as of the case as made by the declaration.

P. Z. Jones and *J. W. Cassedy,* for appellant.

Whether or not the contract be regarded as within the statute of frauds, the plaintiff is entitled to recover the $50 paid by him for the option, the expenses, incurred and damages resulting from loss of time in getting up estimates and securing prospective purchasers. Although the contract to sell was parol, plaintiff was entitled to recover these items. *Welch v. Lawrence,* 32 Miss. 170; *Cain v. Kelly,* 57 Miss. 830; *Yerger v. Knight,* 34 South. 1029.

The declaration avers appellee's knowledge that it was appellant's purpose to resell the property; and, this being the case, and appellee having received $50 in cash from appellant, and knowing further that appellant would incur great expense and loss of time, it must follow that the declaration states a cause of action against appellee, for fraud and deceit.

There is a wide distinction between that class of cases wherein the decisions were based upon an application for specific performance, and that class of cases instituted to recover damages for breach of contract. The authorities with reference to the description necessary in contracts involving land are divided into three classes: First, those with reference to conveyances; second, with reference to agreements to convey; and, third, those with reference to options. In determining the description necessary to support each contract the court will find that a greater certainty is demanded for conveyances than for agreements to convey; and greater certainty is required for agreements to convey than for options.

We recognize the fact that if this suit had been brought to en-

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Brief for appellant.

force specific performance, an entirely different question would have been presented, and the objection would possibly have been well taken on the ground of want of description. In this case Moyse was not by law prohibited from entering into a contract binding himself to convey twenty-two thousand acres of timber lands in Franklin and Jefferson counties for $12.50 per acre. Nor was there anything illegal in Scherck's paying the sum of $50 to Moyse to bind Moyse. The agreement is not open to the criticism of want of description, because an accurate and absolute description is not given in the written option.

The appellee has put himself in the attitude of entering into a contract whereunder he received $50 and whereby he contracted to convey to appellant within fifteen days a certain quantity of timber lands, agreeing also to furnish a man to show the property; yet with such benefits, he persists in claiming the right, while retaining such money and benefits, to refuse to convey the land or to point out the property or to do anything else incumbent upon him under the terms of the option.

The contract evidenced by the option is not void under the statute of frauds. In order properly to construe the contract, the court must consider the positions of the parties at the time when they made their agreement. By so doing it will appear that the appellee claimed to have a large quantity of timber lands in the two counties named and that he would convey to Scherck, on Scherck's acceptance of the terms within fifteen days, the timber lands at twelve dollars and fifty cents per acre. The allegation that Moyse should furnish a man to locate the lands is a sufficient predicate for the introduction of parol and extrinsic evidence to identify and describe the property which the parties had in mind. All of the authorities agree upon the proposition that where there is some reference in the contract whereby extrinsic matters are referred to and that by following such extrinsic evidence the property may be definitely ascertained and located, then in such event the contract is sufficient to meet the statute of frauds.

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Brief for appellee.

W. A. Parsons, for appellee.

The declaration does not charge that appellee practiced any fraud upon appellant, nor that he made any false representations either wilful or not, nor that such false representations had anything to do with the appellant's making the alleged contract. In fact, the declaration fails to set forth any of the elements of an action for deceit. *Cain v. Kelly,* 57 Miss. 830; *Sims v. Eiland,* 57 Miss. 607; *Vincent v. Corbett,* 47 South. 641.

In an action for deceit the plaintiff's declaration must clearly and distinctly allege all of the essential elements of actionable fraud. *Williams v. McFadden,* 23 Fla. 143, 11 Am. St. Rep. 345; *Talbert v. Caledonian Insurance Co.,* 101 Ga. 741; 8 Ency. Pl. & Pr. 899; *Pforheimer v. Selkirk,* 71 Mich. 600; *Parker v. Anderson,* 55 Mich. 176; *Ida v. Gray,* 11 Vt. 615; *Griswold v. Goebel,* 126 Penn. 353.

The declaration does not aver that plaintiff relied upon any false statement of the defendant in regard to the property, its situation, value, title or conditions. There is no allegation of fraudulent concealment of defects of any kind. The demurrer was properly sustained.

The language of the option does not satisfy the requirements of the statute of frauds. *Grafton v. Cummings,* 99 U. S. 100; *Breckinridge v. Crocker,* 78 Cal. 528; *Wood v. Davis,* 32 Ill. 311; *Cossitt v. Hobbes,* 56 Ill. 231; *McConnell v. Brillhart,* 17 Ill. 354; *Taney v. Bachtell,* 9 Gill (Md.), 205.

Parol testimony cannot be resorted to by appellant in order to explain the deficiencies of the option. A contract cannot rest partly in writing and partly in parol. The matter is different from a case where parol evidence is admitted to explain the terms of the contract. *Well v. Willard,* 55 Mo. App. 376.

FLETCHER, J., delivered the opinion of the court.

This is an action to charge the appellee upon the following writing:

"In consideration of $50 I hereby give R. T. Scherck a

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Opinion of the court.

fifteen-day option on 22,000 acres of timber land in Franklin and Jefferson counties, Mississippi, at $12.50 per acre.

"9–23–07. [Signed] J. L. MOYSE.

"Attest: S. D. Wilkinson.

"We will furnish a man to show parties the property.

"[Signed] J. L. MOYSE.

"Attest: S. D. Wilkinson."

The declaration contains three counts, and states substantially that this option was given by appellee, and that it was understood verbally between the parties that certain named tracts of land were referred to, one lying in Franklin and the other in Jefferson counties; that appellant paid $50 for the option, and expended considerable sums in having the lands examined and the timber estimated; that he had secured a purchaser, who would buy the lands at an advance of $1.50 an acre over the purchase price; that appellee did not own the lands at the time the option contract was signed, and had either failed or refused to secure the same; that there was a failure to deliver the lands, although the purchase money had been tendered; and that by losing the opportunity to make a re-sale appellant had been damaged to the extent of $33,000; this being at the rate of $1.50 per acre on 22,000 acres. To this declaration a demurrer was interposed, and sustained, on the ground that the option memorandum is void under the statute of frauds, since there is no sort of description of the property.

It is obvious that the memorandum does not satisfy the statute, and equally obvious that parol testimony cannot be resorted to in order to supplement the deficiencies in the written memorandum. Indeed, appellant practically concedes that specific performance of the contract could not be enforced; but it is claimed that it may form the basis of a suit for damages. We may dispose of this contention by saying that the only damages sought to be here recovered are the profits on a resale, and that these are not recoverable, except in a common-law action for fraud and deceit. The declaration in this case was man-

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Statement of the case.

ifestly not drawn on that theory, since there is utterly lacking every averment essential to such an action. The rules both of pleading and evidence governing this class of actions have lately been reviewed by this count in the case of *Vincent v. Corbitt, ante* 46, 47 South. 641, and need not be here repeated. The suit is clearly not such an action.

Affirmed.

JAMES J. SAMPLE ET AL. v. TOWN OF VERONA.

[45 South. 2.]

1. MUNICIPALITIES. *Ordinances. Titles. Code* 1906, § 3406.

The provision of Code 1906, § 3406, requiring the subject-matters of municipal ordinances to be clearly expressed in their titles, is mandatory, and such an ordinance having no title is void.

2. CRIMINAL LAW AND PROCEDURE. *Illegal voting. Code* 1906, § 1122. *Municipal election.*

A municipal election is within Code 1906, § 1122, making illegal voting at any election an indictable offense.

FROM the circuit court of Lee county.

HON. EUGENE O. SYKES, Judge.

Sample and another, "two gentlemen of Verona," appellants, were tried and convicted on the charge of illegally voting at a municipal election in violation of a municipal ordinance, were each fined $10, and appealed to the supreme court.

The appellants were separately charged, before the mayor's court of the town of Verona, with illegally voting at a certain municipal election "contrary to the ordinances of said town in such cases made and provided, and against the good order and peace thereof." Having been convicted, they severally appealed to the circuit court, where the two cases were tried jointly. The ordinance which appellants were charged with violating, and which is referred to in the opinion of the court, is as follows:

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Brief for appellants.

"Be it ordained by the mayor and board of alderman of the town of Verona, that all offenses under the penal laws of the state, Code of 1906, amounting to a misdemeanor shall be offenses against the town of Verona, in whose corporate limits the offense may have been committed, and upon conviction thereof the same punishment shall be imposed by the town of Verona as is provided by the laws of the state not in excess of the maximum penalty which may be imposed by a municipal corporation. For reasons satisfactory to the mayor and board of alderman, this ordinance shall be effective from and after its passage."

The evidence discloses that the two appellants, who were negroes, were not registered voters of Lee county at the time they voted in the municipal election held in Verona for election of aldermen.

Anderson & Long, for appellants.

The appellants were convicted on a charge of illegally voting in a special election held in the town of Verona for the election of two alderman. The conviction was under a general ordinance purporting to make all violations of the state law, of a less grade than felony, violations of the ordinance of the town of Verona. Strenuous objection was made by appellants in the court below to the introduction in evidence of the ordinance, and also of the municipal minute book, because the ordinance had no title or heading as required by Code 1906, § 3406; and also because neither the ordinance nor the minute book containing the ordinance showed that Code 1906, § 3405, was complied with in the adoption of the ordinance.

The two code sections above cited are mandatory. *Winfield v. Jackson,* 89 Miss. 272, 42 South. 183; *Chrisman v. Jackson,* 84 Miss. 787, 37 South. 1015; *Ocean Springs v. Green,* 77 Miss. 472, 27 South. 743; *Kemp v. Hazlehurst,* 80 Miss. 443, 31 South. 908; *Morris v. Greenwood,* 73 Miss. 430, 19 South. 105. Even if the code sections are not literally followed,

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there must be a substantial compliance with their provisions. *Swan v. Buck,* 40 Miss. 268. There can be no substantial compliance with Code 1906, § 3406, when the municipal ordinance has no title whatever. 21 Am. & Eng. Ency. Law (2d ed.), 974, 975; *San Antonio v. Micklejohn,* 89 Tex. 79.

Code 1906, § 1122, is the only statute in our state providing for the punishment of any one illegally voting in an election; and the appellants were tried for violating this code section. Even if the ordinance of the town had been properly enacted, still the appellants could not legally be held, because Code 1906, § 1122, does not make illegal voting in a municipal election an offense. The statute does not mention municipal elections. *Commonwealth v. Howe,* 114 Mass. 144; *Nettles v. State,* 49 Ala. 35.

George Butler, assistant attorney-general, for appellee.

Code 1906, § 3404, provides for the style and publication of all municipal ordinances. And by Code 1906, § 3408, the mayor and board of aldermen are authorized to order a codification or revision of the municipal ordinances, from time to time. By Code 1906, § 3410, it is prescribed that, "when so provided by a general ordinance of the municipality," offenses against the state laws, less than felony, may be made offenses against the municipality. These several code sections must be construed together. In the codification of the municipal laws the legislature hardly contemplated that each and every section should be given a title. Nor was it contemplated that each and every offense was to be embraced within the title of the general ordinance provided by Code 1906, § 3410. The manifest purpose of Code 1906, § 3406, is to prevent the joining together of several independent and incongruous matters in one ordinance, and to prevent deception of the public or members of the council by means of provisions in ordinances of which the title gives no intimation. 28 Ency. Law, 572.

As the legislature has in effect said that the general ordi-

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nance provided for by Code 1906, § 3410, might embrace more than one subject, we are therefore bound to conclude that Code 1906, § 3406, has no application to the general ordinance provided by Code 1906, § 3410. The code section then might read: "An ordinance shall not contain more than one subject which shall be clearly expressed in its title, but this shall not apply to the general ordinance provided for by § 3410." The embracing of all of these different offenses in one ordinance is in itself a codification of the criminal ordinances of the municipality.

WHITFIELD, C. J., delivered the opinion of the court.

The ordinance under which these appellants were convicted was adopted without any title whatever. Section 3406, Code of 1906, is in the following words:

"An ordinance shall not contain more than one subject, which shall be clearly expressed in its title; and an ordinance shall not be amended or revised unless the new ordinance contain the entire ordinance as revised, or the section or sections as amended, and the original shall thereby be repealed."

Section 71 of the Constitution of 1890 is in the following words: "Every bill introduced into the legislature shall have a title, and the title ought to indicate clearly the subject-matter or matters of the proposed legislation. Each committee to which a bill may be referred shall express, in writing, its judgment of the sufficiency of the title of the bill, and this, too, whether the recommendation be that the bill do pass or do not pass."

In respect to constitutional provision of this kind it is said in 26 Am. & Eng. Ency. of Law (2d ed.), p. 572; "In Ohio the peculiar doctrine is maintained that the provision is merely directory to the legislature, giving the courts no power to declare an act invalid because violative thereof, and the California court held the same way under a former constitution in that state. But it is somewhat difficult to conceive how any express

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constitutional limitation on the power of the legislature can be regarded as directory only, and certainly such provisions are everywhere else deemed to be mandatory, requiring the courts to pronounce invalid all statutes in violation thereof." Manifestly the provision of our constitution is mandatory in this regard; and so, also, is section 3406 of the Code of 1906 as to municipal ordinances. The ordinance should have been excluded.

Section 1122, Code of 1906, is in the following words:

"Any person who shall vote at any election, not being legally qualified, or who shall vote in more than one county, or at more than one place in any county, or in any city, town, or village entitled to separate representation, or who shall vote out of the district in which he resides, shall be liable to indictment, and, on conviction, shall be fined not exceeding two hundred dollars, or be imprisoned in the county jail not more than six months, or both." A municipal election is included in the language "at any election."

But for the error in admitting this void ordinance the judgment is reversed, and the prisoners discharged.

Reversed.

WILLIAM C. GEORGE v. PINK WOOD.

[49 South. 147.]

1. JUDICIAL SALES. *Confirmation. Chancellor's power. Vacation.*

A chancellor is without power in vacation to confirm a judicial sale to which objection is made because of the inadequacy of the price bid for the property.

2. SAME. *Code* 1906, § 657.

The qualifying words, "where there is no contest," in Code 1906, § 657, authorizing the chancellor in vacation to confirm sales and partitions in kind, are applicable to reports of sales as well as to partitions.

3. SAME. *Inadequacy of price. Resale.*

Gross inadequacy of price warrants a refusal to confirm a judicial sale and an order directing a resale of the property.

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Brief for appellants.

4. SAME. *Reversal of decree after sale but before confirmation. Partition. Excessive charge on share.*

Where, upon a nonsuspensive appeal, a partition decree charging the share of one of the cotenants with excessive rents and ordering it sold therefor was reversed by the supreme court because of the excess, confirmation of sale made thereunder, before the reversal, should thereafter be denied the purchaser and a resale for the smaller sum found due be ordered.

5. STATUTORY CONSTRUCTION. *Amended statute.*

An amended statute must be construed according to its plain and obvious meaning, viewed in its entirety.

FROM the chancery court of Leflore county.

HON. PERCY BELL, Chancellor.

Mrs. Wood, appellee, was complainant in the court below and one Bowles and others were defendants there. The case has been in the supreme court several times. See *Bowles v. Wood,* 90 Miss. 742, the opinion there reported showing that the case was then upon its fourth appeal. See also *Wood v. Bowles,* 92 Miss. 843, 46 South. 414, another branch of the same case. The proceeding was one for partition of lands between cotenants and an accounting for rents. The facts are stated in the opinion of the court. George, the appellant, was the purchaser at the judicial sale, the confirmation of which was involved.

Tim E. Cooper and *Hallam & Cooper,* for appellants.

This record presents for decision three questions, first, the power of the chancellor to confirm the sale to George, in vacation; second, the effect which the reversal of the decree by the supreme court had upon the rights of a *bona fide* purchaser at the commissioner's sale; third, the power of the chancellor to set aside his decree confirming the sale in vacation at the second term after such confirmation.

The only objections made by Bowles to the confirmation of the sale were, first, a lack of bidders; and second, inadequacy of price. It is not contended anywhere that the sale was not made in perfect good faith, or that fraud or mistake of any de-

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scription had anything to do with the lack of bidders, or caused an inadequacy of price. Then, was the mere filing of the above objections such a "contest" as is contemplated by the statute? Evidently the learned chancellor did not think so. It is almost universally held that mere inadequacy of price, or a lack of bidders, unless caused by fraud or mistake, are not sufficient grounds for setting aside a judicial sale. The objections filed present no other grounds, and are on their face insufficient to warrant the setting aside of such sale. If this be true, then an objection on the ground of inadequacy of price and lack of bidders, if true, is not sufficient ground to warrant the chancellor in refusing to confirm the sale in vacation. The objections filed present no contest which the law recognizes.

To hold that any sort of objection to the confirmation of a judicial sale constitutes a contest within the meaning of the statute, would, it seems to us, be contrary to its purpose. A person then might object to the confirmation of a judicial sale on the ground that it would strip him of all his property, save his homestead, and leave him penniless, and the chancellor would be without power to confirm the sale in vacation. Certainly such a result was never contemplated. In this case it is not even shown by any sort of evidence that there was in fact a lack of bidders, or that the price realized at the sale was inadequate. But even if there had been proof of these facts, the court, under construction of the statute, would have been justified in refusing to hear the evidence; for if the alleged facts were proved, the sale must have been confirmed. The statute does not contemplate a mere protest, but refers to some legal objection which if proved would in law prevent confirmation.

In the absence of any showing of fraud or irregularity, mere inadequacy of price will not justify the court in setting aside a judicial sale. *Nix v. Draughon,* 56 Ark. 240, 19 S. W. 669; *Conway v. Johns,* 14 Colo. 30, 23 Pac. 170; *O'Callaghan v. O'Callaghan,* 91 Ill. 228; *Sowle v. Champion,* 16 Ind. 165; *Passmore v. Moore* (Ky.), 22 S. W. 325; *House v. Walker,* 4

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Md. Ch. 62; *Wagner v. Phillips,* 51 Mo. 117; *Marlett v. Warwick,* 18 N. J. Eq. 108; *White v. Floyd* (S. C.), 1 Speers, Eq. 351; *Myers v. James,* 72 Tenn. (4 Lea), 370; *McKennon v. McGowan* (Sup.), 11 S. W. 532; *Harmon v. Copenhaven,* 89 Va. 836, 17 S. E. 482.

There is another question with reference to the construction of this statute which deserves mention. By reference to Laws 1900, p. 135, ch. 95, it will be seen that the law just prior to the adoption of the Code of 1906 provided that reports of sales or leases might be made to the chancellor, and by him confirmed in vacation, and this whether there was a contest or not. Nothing is said in the laws of 1900 about a contest, or about a report of confirmation of partition in kind. The legislature, in adopting the Code of 1906, incorporated into the Law of 1900 these words: "or of partition in kind, where there is no contest," so that section 657 of the Code of 1906, reads as follows:

"Reports of sales or leases or partition in kind, where there is no contest, may be made in vacation by the chancellor," and upon five days' notice confirmed, etc.

The court will observe that there is a comma after the words "partition in kind." The point we wish to urge is that the words in quotation, "or of partition in kind, where there is no contest" being an innovation in the law as it formerly stood, the word "contest" refers only to the reports of partitions in kind, and does not refer back to the words "report of sales or leases," and that the comma in section 657, Code 1906, is misplaced and should follow the word "leases" instead of the word "kind." The court will look to the intent of the legislature in construing statutes, and if the punctuation would seem to run counter to the evident intent of the statute the punctuation will be disregarded. Under the construction of the statute here contended for, the chancellor had power to confirm the sale of the commissioner in vacation, and this notwithstanding the objection to the confirmation filed by the appellee.

"In construing a statute, the intention of the legislature

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should be followed wherever it can be discovered, although the construction seems contrary to the letter of the statute." *Griswold v. National Insurance Co.*, 3 Cow. 89; *Crocker v. Crane*, 21 Wend. 21, cited in *Eskridge v. McGruder*, 45 Miss. 294; *Fitzgerald v. Rees*, 67 Miss. 473, 7 South. 341; *Earhart v. State*, 67 Miss. 325, 7 South. 347.

S. R. Coleman and *McWillie & Thompson*, for appellees.

The pivotal point in this case seems to be whether or not the confirmation of the sale to W. C. George was void, for if it was void there can be no doubt about the authority of the court to disaffirm the sale on the reversal of the decree under which it was made. Until confirmation the sale is *in fieri* and under the control of the court, and when it is made apparent by the result of an appeal that the decree directing it was erroneous as for instance where the property was decreed to be sold and was in fact sold to pay $10,000 when only $100 was due, clearly a new sale should be ordered. Title does not pass in such cases until the sale is confirmed and a void confirmation gives the purchaser no rights, his subsequent payment of the purchase money being entirely voluntary and like the commissioner's conveyance to him, if one be made, wholly without effect.

Of course a decree of confirmation that the chancellor was without power to make is a nullity, and the record must in such case be treated as showing no confirmation whatever. 17 Am. & Eng. Ency. of Law (2d ed.), 989, 990; Brame & Alexander's Dig. Title, Judicial Sales, VI. Confirmation, p. 689. The pretended confirmation of the sale to appellant, George, was made by the chancellor in vacation under section 657, Code of 1906, which only authorized confirmation in vacation where there was no contest; but in this case there was a contest.

The appellant contends that under the section in question, which reads that "Reports of sales or leases or of partition in kind, where there is no contest," may be made and confirmed in vacation, only partitions in kind are affected by the qualifica-

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tion as to the existence of a contest. This is a forced construction of the statute, against its terms, and against its punctuation. No reason whatever is suggested why there should be a different rule in the case of partitions in kind, and it is clear the legislature did not intend to make one.

The appellant also argues that because the formal objections in writing to confirmation were not, as he claims, meritorious, there was no contest at all. This position is clearly unsound. The primary meaning of the verb "to contest" is to make a subject of dispute, contention or litigation; to call in question, to controvert, to oppose, to dispute. It is further defined as meaning, to defend, as a suit or other judicial proceeding; to dispute or resist, as a claim, by course of law; to litigate. The noun "contest" denotes a contention, strife, struggle, litigation. 9 Cyc. 70, 7 Am. & Eng. Ency. of Law (2d ed.), 78. It has been held that a claim against an estate may be a "contested" one under the Georgia statute although the executor sees it to be beyond doubt as to its legality and one that no court would hold to be of doubtful obligation. *Maynard v. Cleveland,* 76 Ga. 71.

The statute was manifestly intended to give judisdiction to confirm in vacation only in those cases where the parties were satisfied with the sale or too indifferent to object. The very short notice provided for only five days before the hearing indicates this quite plainly, for in case of the trial of objections the parties would in nearly all instances require more time than five days for preparation, the getting up of their evidence.

But the appellant is mistaken even in the assumption that the objections filed were insufficient because inadequacy of price unaccompanied by fraud is no ground for withholding confirmation. Gross inadequacy is recognized by this court as raising a presumption of fraud, and the inadequacy mentioned in the formal objection is denominated gross inadequacy, the price paid being alleged to be only about one-half the value of the property. *Allen v. Martin,* 61 Miss. 78.

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Brief for appellees.

Undoubtedly the confirmation was contested. As soon as it became apparent to the chancellor that objection was made he should have suspended action on the motion until term time. By the mere fact of objection he was shorn of all power to act in vacation even so far as to inquire whether the grounds of objection were sufficient or insufficient.

The effect of the pendency of the appeal should not be lost sight of as the sale was not only confirmed in vacation without authority, but was also confirmed during the pendency of the former appear herein in which the decree of sale was reversed.

An appeal, though without *supersedeas*, operates as a transfer of jurisdiction and a chancery court can make no further order or decree in a case during the pendency of an appeal. The case is out of that court and in the supreme court until the appeal is disposed of. 2 Ency. Pl. & Pr. 327.

There is a great difference between a judicial sale under a final decree and a sale under execution. In the former case the sale is the act of the court and title does not vest by the act of the commissioner as it does by the act of the sheriff in selling under an execution. The court has nothing to do with a sale under execution from the time it awards judgment, everything else that is done being the work of a ministerial officer and it is good without further action of the court; but a judicial sale is of no validity and there is no vestiture of title until confirmation.

The appellant is relying not on a mere sale which like one under execution would be good without further action of the court but is relying on an affirmative act of the court, that of confirmation, which it had no right to make in cases of contest during vacation or pending an appeal to the supreme court.

We have no fault to find with the cases cited by opposing counsel as we feel entirely satisfied that the court will regard them with its usual discrimination and not confound a sale under a final decree which is the act of the court with a sale under execution which is the act of the officer. That the court is the real vendor in the former case has been declared by this court

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in an elaborate opinion, the soundness of which has never been questioned. *Cocks v. Simmons,* 57 Miss. 183. We do not deem it necessary to add anything in answer to what has been said as to the proper construction of Code 1906, § 657. The section is perfectly plain in its meaning, and if the section as it now stands was the result of amendment of former statutes surely the legislature of 1906 had the power to amend, and incapacity to say what was intended cannot be imputed to the legislature.

There is a question back of all this, however. By Constitution 1890, section 159, jurisdiction over certain matters including controversies like the case before us is given to the chancery court but not to the chancellor. Can the legislature authorize the chancellor to assume the exercise of this jurisdiction in vacation so that his action will be final and independent of the express or tacit approval of the court in term time? The chancellor acting in vacation is not the chancery court.

Argued orally by *Tim E. Cooper,* for appellant and by *T. A. McWillie,* for appellee.

FLETCHER, J., delivered the opinion of the court.

In November, 1906, the chancery court of Leflore county entered a decree in the case of *Pink Wood v. F. N. Bowles, et al.,* confirming the report of certain commissioners previously appointed to *partite* the lands in controversy. By this decree a lien was fixed upon the share of F. N. Bowles on account of certain rent charges; the amount being calculated upon the basis of $5 per acre. The decree provided that Bowles' share should be sold to satisfy this lien unless the amount be paid within thirty day from the rendition of the decree. From this decree Bowles prosecuted an appeal, but without *supersedeas.* Pending the appeal, the commissioner appointed for that purpose advertised for sale the land allotted to Bowles, and at the sale William C. George, appellant, became the purchaser, paying $2,750 for the land. This sale was attempted to be con-

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firmed in vacation, although Bowles had filed a protest against the confirmation, alleging that the price paid was grossly inadequate. Disregarding this protest, the chancellor in vacation confirmed the sale and directed the commissioner to make deed to the purchaser. Subsequent to all these proceedings, the supreme court reversed the decree appealed from, holding that the rentals should have been fixed at $4 per acre. *Bowles v. Wood*, 90 Miss. 742, 44 South. 169. After the filing of the mandate, and at the next succeeding term of the chancery court, all of the proceedings by which George became the purchaser were set aside, and another decree was entered fixing the charge upon the land of Bowles in accordance with the view of the supreme court and again directing a sale of the property allotted to Bowles in the event that this new and corrected amount was not promptly paid. From this decree George, the purchaser at the sale under the reversed decree, appeals.

Among other matters presented for decision is the meaning of section 657, of the Code of 1906, dealing with confirmations in vacation. That section is as follows:

"Reports of sales or leases, or of partition in kind, where there is no contest, may be made in vacation to the chancellor, and upon five days' notice to the parties and the purchaser or lessee of the time and place of hearing the application therefor, or upon such publication for any of the interested parties who may be nonresidents of this state, or who cannot be found upon diligent inquiry, as is required for nonresident or absent defendants in chancery, may be confirmed by him."

It is insisted on behalf of the appellant that the qualifying words, "where there is no contest," modify alone the phrase next immediately preceding them, and have no reference to reports of sales. The argument is based largely upon the fact that the words "or of partition in kind, where there is no contest" were inserted by the legislature of 1906, thus amending the law as it stood prior to that time; that, since these words came into the statute together as an amendment to existing law, they should be

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construed together as introducing a new form of vacation business with a modification applicable alone to this new form. We cannot accept this view. The argument is not without force; but we must look at the statute as it stands after amendment, and construe it according to its plain and obvious meaning, considering the whole statute according to the natural signification of the words in the order of grammatical arrangement in which they are placed. So looking at this statute, we think the court was without power to confirm this sale in vacation, since one party in interest had filed a protest against the confirmation.

It is said, however, that the contest must be a real one, one which presents some substantial reason why the sale should not be confirmed, and that the protest filed in this case is frivolous, and not such a contest as the statute contemplates. But the protest alleges a gross inadequacy of price, and this charge, if sustained by proof, would furnish ground for the chancellor, in the exercise of a sound discretion, to order a resale. We cannot hold that a *bona fide* contest, within the meaning of the statute, was not presented by this protest.

Finally, it is earnestly argued that, conceding that the chancery court was without power to confirm in vacation, yet that the purchaser has acquired certain rights by the fact of his being a purchaser, and that he is entitled to have the sale confirmed at the next succeeding term of court, and that to deny him this right is an abuse of judicial discretion. But this contention ignores the effect on the matter of the fact of reversal. The original decree appealed from fixed as a lien upon the land an amount which was afterwards adjudged to be excessive. It was the privilege of Bowles to prevent a sale of the land by paying off and discharging this lien. True, he chose neither to pay the amount nor to supersede the decree. He permitted the land to sell; but, before this sale was lawfully confirmed, he secured an adjudication that the amount of the lien was excessive, and that a sum substantially less was the true amount which Bowles should have been required to pay. When the whole case came

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Statement of the case.

again before the chancery court, all the proceedings being *in fieri,* it was manifestly the just and equitable course to pursue that Bowles should have the opportunity to save his property from sale by paying off the amount of the lien, which had been substantially diminished by the action of the supreme court. Whether the sale was proper in the first instance, in the light of the fact that an appeal had been taken, is not presented for decision. We are dealing with the particular facts of this case. Here, before the rights of the purchaser had become final by confirmation, it was judicially ascertained that an injustice had been done Bowles in fixing the amount which he was required to pay. In this attitude of the matter, we think it was proper for the court to rescind its former action, that the owner of the land might suffer no injustice.

Affirmed and remanded.

JOHN CLEARY v. ANDREW A. MORSON.

[48 South. 817.]

CONDITIONAL SALES. *Implied obligation. Remedy of seller against third persons. Rescission.*

Where a person contracted to sell a horse in consideration of the buyer's working for him for a specified term, the title to the horse to remain in the seller until paid for, the contract was an entirety, and, the buyer having abandoned his contract, the seller had the right to reclaim the horse from a third person, to whom it had been sold by the buyer; the third person having no better right to it than the buyer had.

FROM the circuit court of, first district, Hinds county.

HON. WILEY H. POTTER, Judge.

Morson, appellee, was plaintiff in the court below and Cleary, appellant, was defendant there. From a judgment, predicated of a peremptory instruction, in plaintiff's favor defendant appealed to the supreme court. The opinion states the facts.

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Brief for appellee.

Greaves, Easterling & Manship, for appellant.

Conditional sales of personalty are to be considered, under the many decisions of this court, as partaking of the nature of chattel mortgages. *Burnley v. Tufts,* 66 Miss. 48, 5 South. 627; *Dederick v. Wolf,* 68 Miss. 500, 9 South. 350; *Tufts v. Stone,* 70 Miss. 54, 11 South. 792; *Ketchum v. Brennan,* 53 Miss. 596; *Duke v. Shackleford,* 56 Miss. 552; *Ross v. Pascagoula Ice Co.,* 72 Miss. 608, 18 South. 364. Wilson had a qualified property interest in the animal, which passed to Cleary by the sale; and Cleary's right to possession could not be disturbed until default in payment. Inasmuch as the debt was not due, Cleary had the right to retain possession until Dec. 15, 1908. Under the circumstances, this replevin suit, instituted in July, 1908, was premature. *Dederick v. Wolf, supra; Heflin v. Slay,* 78 Ala. 180; *Welden v. Witt,* 40 South. 126; *Leflore v. Miller,* 65 Miss. 204, 1 South 99; *Newhall v. Kingsberry,* 131 Mass. 445; *Hardy v. Monroe,* 127 Mass. 64; *McFarlan v. Farmer,* 32 N. H. 391; *Lambert v. McLeod,* 63 Cal. 162.

A conditional vendee has such rights in the personal property sold him as will enable him to sell or mortgage it to another. *Hatch v. Lames,* 117 Mass. 324; *Currie v. Knapp,* 65 N. H. 1; Benjamin on Sales, 269–426; *Carpenter v. Scott,* 13 R. I. 437.

J. C. Ward, for appellee.

A vendor of personalty sold on credit, who reserves title thereto in himself, can bring an action of replevin to recover such personalty from one who has purchased it from his original vendee, before the maturity of the debt. *Zimmerman Lbr. Co. v. Elder* (Miss.), 29 South. 456.

The subsequent sale of the horse to Cleary was contrary to the terms of the original contract of conditional sale, and the vendor Morson, had a right to treat the original contract of sale as rescinded and to bring replevin at once to recover the horse. *Sims v. Names,* 62 Ga. 260; *Patridge v. Philbrick,* 60 N. H. 536; *Whitney v. Connell,* 29 Mich. 12; *Eaton v. Munroe,* 52

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Me. 63; *Harmark v. Martin*, 55 Tenn. 482; *Bigelow v. Huntley*, 8 Vt. 151.

The giving of a deed of trust or other lien on the property is a breach of the conditional sale and entitles the vendor to bring a replevin to recover it. *Machine Co. v. Stewart*, 57 Hun (N. Y.), 545.

FLETCHER, J., delivered the opinion of the court.

This is a replevin suit, brought by Morson against Cleary for the recovery of a mare sold conditionally by Morson to one Wilson, and by Wilson sold to Cleary. It appears that Morson and Wilson entered into a contract evidenced by the following memorandum:

"This memoranda of agreement, made and entered into between Andrew A. Morson, party of the first part, and Reuben Wilson, party of the second part, witnesseth: That the said Reuben Wilson, party of the second part, for and in consideration of twenty dollars ($20.00) to him in hand paid, the receipt of which is hereby acknowledged, and for the further consideration of $40.00 per month, payable monthly, agrees to work for the said Morson, as also to furnish the services of Jim White from the first day of January, A. D. 1908, to the first day of January, 1909. The said A. A. Morson also agrees to give the said Reuben Wilson six (6) acres of land free of rent, and to sell to him one mare, named Alma, for $125.00, said amount to be paid on the 15th day of December, 1908. Title to said mare to remain with said Morson until paid. The above $20.00 is payable on the 15th day of December, 1908.

"[Signed] A. A. MORSON.
"REUBEN WILSON."

It will be noted that the animal was not to be paid for until December 15th. Morson testified that at the time of making this contract he was badly in need of labor, and that the mare was sold and the six acres of land furnished as an additional inducement to secure the labor contract. In July Wilson abandoned

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Brief for appellees.

his contract, sold the mare to Clearly outright, under the pretense that he was the unconditional owner, and fled the country. Thereupon Morson, after demand for possession and refusal, instituted this action against Cleary without waiting for the maturity of the debt. Cleary's sole defense is that the debt was not due, and that he had the right to retain possession until December 15th, and the further right at that time to secure title by paying the purchase money. However, no offer to pay the debt was made by Cleary. From a judgment predicated of a peremptory instruction in favor of Morson, Cleary appeals.

It is earnestly and very forcibly contended, on appellant's behalf, that Wilson had a qualified property interest in the animal, which passed to Cleary by the sale, and that Cleary's right to possession could not be disturbed until default had occurred in the payment; and in support of this contention many authorities are cited, some of which, at least, undoubtedly maintain this contention. On the other hand, appellee argues that a contract for the conditional sale of property contains an implied condition that the purchaser will retain possession, and that a sale of the property, involving a change of possesion, is a breach of the contract, which warrants the seller in treating the contract as rescinded. Quite a number of respectable authorities are produced in support of this view, some of which depend upon the distinction that, while the conditional purchaser may properly dispose of his interest in the chattel, he may not make a sale by which he undertakes to transfer the unconditional title. In this case we are not driven to decide between these conflicting lines of authority, or pass upon the soundness of this distinction. We think the contract made between Morson and Wilson should be considered as an entirety, and that the sale of the mare must be held to depend upon Wilson's agreement to labor. It is clear that the sale would not have been made, but for Morson's desire to secure labor, and, when that part of the contract was breached by Wilson, Morson had a right to treat the whole contract as at an end and reclaim the property. It is obvious

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that Cleary secured no higher or better right than Wilson had, and we think the property could have been retaken from Wilson before maturity, if Wilson had abandoned his employment and removed from Morson's premises. *Hall v. Draper,* 20 Kan. 137. In this view of the matter, the action of the circuit court was correct. *Affirmed.*

VICKSBURG MANUFACTURING AND SUPPLY COMPANY v. JAFFRAY CONSTRUCTION COMPANY ET AL.

[49 South. 116.]

1. MECHANICS' LIENS. *Notice to owner. Requisites*

Under Code 1906, § 3074, relating to mechanics' liens, and requiring notice from the person furnishing the material, a notice of an unpaid bill for material furnished a contractor, which states that persons giving the notice act as agents only for others, to whom the bill is due, is not a sufficient notice to bind the amount in the hands of the owner of the building; and, as the owner did not owe the alleged principals, the persons giving the notice cannot claim that they have paid the amount of the bill to the alleged principals and have been subrogated to their rights against the owner.

2. SAME. *Appeal and error. Review. Questions considered. Change of issues.*

Where a personal action is brought against a contractor by a materialman for a balance due, and the owner of the building is joined, and an attempt is made to establish a materialman's lien, but no personal judgment is sought against the owner, it cannot be urged, on appeal from an instruction to find for the owner, that the evidence established an independent contract between the owner and the materialman to pay for the material furnished, as the issues on appeal must be the same as those made in the lower court.

3. SAME. *Frauds, statute of. Promises to answer for debt of another.*

An agreement by the owner of a building to become liable as surety for material furnished his contractor is within the statute of frauds.

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Statement of the case.

FROM the circuit court of Warren county.

HON. JOHN M. BUSH, Judge.

The Vicksburg Manufacturing and Supply Company, appellant, a corporation, was plaintiff in the court below and John H. Jaffray, doing business under the name "The Jaffray Construction Company," and another, appellees, were defendants there. From a judgment adverse to plaintiff it appealed to the supreme court.

The opinion states the facts. Code 1906, § 3074, referred to in the opinion is as follows:

Subcontractors, laborers, etc., may bind the amount due the contractor by written notice.—When any contractor or master workman shall not pay any person who may have furnished materials used in the erection, construction, alteration, or repairing, of any house, building, structure, fixture, boat, watercraft, railroad embankment, or the amount due by him to any subcontractor therein, or the wages of any journeyman or laborer employed by him therein, such person, subcontractor, journeyman or laborer may give notice, in writing, to the owner thereof of the amount due; and thereupon the amount that may be due by such owner to the contractor or master workman shall be bound and liable in the hands of such owner for the payment of the sum so claimed; and if, after notice, the contractor or master workman shall bring suit against the owner, the latter may pay into court the amount due on the contract; and the person giving notice shall be summoned to contest the demand of such contractor or master workman; and the court may cause an issue to be made up and tried, and direct payment of the amount claimed by the person giving notice out of the money so paid into court; or, in case the person giving the notice shall sue the contractor or master workman, he shall make the owner a party to the suit, and thereupon the owner may pay into court the amount due on the contract, or sufficient to pay the sum claimed, and costs, and the court shall award the same to the person who may be entitled thereto; and in neither case shall the owner be liable

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to pay costs; but if the owner, when sued with the contractor or master workman, shall deny any indebtedness sufficient to satisfy the sum claimed, and all costs, the court, at the instance of the plaintiff, may cause an issue to be made up to ascertain the true amount of such indebtedness, and shall give judgment and award costs according to the justice of the case. In case judgment shall be given in favor of the person giving the notice, as hereinbefore provided for, against the owner, such judgment shall be a lien from the date of such notice, on the building, house, structure, fixture, boat, watercraft, railroad, or railroad embankment in or upon which the material or labor mentioned in such notice was used or done, and may be enforced as in case of liens in other cases provided for in this chapter.

Harris & Willing, for appellant.

The evidence shows that Jaffray unequivocally promised appellant's representative to pay for the material, and since the material was delivered on the faith of the promise, a binding contract arose between appellant and Askew whereby the latter obligated himself to pay cash for the millwork. This was not a promise upon the part of Askew to guarantee the payment of Jaffray's account, which would be invalid under the statute of frauds, but it was an unequivocal promise on Askew's part to pay for the millwork. In other words, the credit was extended directly to Askew by appellant, who was unwilling to carry out its contract with Jaffray because of his failure to comply with previous obligations. See *Lake v. Brannin,* 90 Miss. 737, 44 South. 65.

The testimony of the secretary and manager of the appellant shows that appellant and Askew had entered into an independant contract in regard to the millwork wherein Askew bound himself directly to pay appellant the amount sued for, hence the lien arose in favor of appellant by virtue of a sale of the material directly to Askew, the owner. The relationship of appellant and Askew to each other was such that notice was im-

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Brief for appellees.

material. See *Academy v. Port Gibson Mfg. Co.*, 80 Miss. 517, 32 South. 311.

This court has repeatedly held that the statute in regard to the lien of mechanics and materialmen must be literally construed. *Buck v. Brian*, 2 How. (Miss.), 874; *Buchanan v. Smith*, 43 Miss. 90; *Weathersby v. St. Clair*, 43 Miss. 189; *Sharpe v. Spengler*, 48 Miss. 360.

But if notice was necessary under the circumstances, the letter of October 15, 1907, to Askew was sufficient. Askew was thereby informed of the nature and amount of the debt. He knew that it was for millwork to be furnished for his building, and the exact amount of the bill was stated in the letter. He knew of the contract between appellant and Jaffray, and, in addition, according to the testimony of appellant's secretary and manager, a new contract was entered into between him and plaintiff whereby the credit was extended directly to Askew, and the millwork was delivered to him on the faith of his promise to send a cheque in payment for it promptly. The object of notice is to impart to the owner information of the amount and character of the claim intended to be fixed as a lien upon the property so that he may protect himself in any future dealings with the contractors. 15 Am. & Eng. Ency. Law. (1st ed.), 127; 27 Cyc. 118; *Towner v. Remick*, 19 Mo. App. 205; *Hausman Bros. Mfg. Co. v. Kempfert*, 93 Wis. 587.

Certainly the notice was sufficient in favor of Gauger & Company, for whom this appellant claims to be acting as agent; and, as appellant has paid Gauger & Company in full, appellant should now be subrogated for whatever rights accrued in favor of Gauger & Company under such notice.

Catchings & Catchings, for appellees.

The peremptory instruction in favor of appellee, Askew, was properly granted, because of appellant's failure to comply with the statutory requirements as to notice in the following particulars.

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Brief for appellees.

1. The notice was defective. While it is true that the notice required to be given is sufficient if it substantially conforms to the statutory requirements, yet to so conform it must be such as will fairly inform the owner of the nature and amount of the claim and of the intention to fix a lien therefor. 20 Am. & Eng. Ency. Law (2d ed.), 380.

2. By the undisputed testimony nothing was due on account of the millwork at the time the notice was given. Under the terms of Code 1906, § 3074, no lien can be fixed for a debt not due at the time the notice is given.

3. The notice purports only to fix a lien for the millwork, while this suit is for the balance alleged to be due on the entire contract between appellant and Jaffray which balance includes many other materials. The bill of particulars filed with the petition shows that only one account was kept which included the lumber as well as the millwork. The amount sued for is ascertained merely by deducting from the aggregate amount due for all the materials furnished the aggregate amounts paid on the account.

4. Appellee paid the appellant, after the date of the notice, sums sufficient to discharge the lien if any was created.

5. The lien related only to particular items of the indebtedness due or to become due from Jaffray to appellant. Under the statute the materialmen cannot require the owner to keep an elaborate set of books and accounts of the different items, but the person seeking to fix a lien must give notice of the full amount due. The materialman is entitled to only one lien, and that for the entire amount.

6. The notice was given on behalf of Gauger & Company who were strangers to the proceedings and not entitled to a lien under any circumstances. 20 Am. & Eng. Ency. Law (2d ed.), 336.

7. The notice was not properly served. In order for one to avail himself of the statute he must bring himself within its

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Opinion of the court.

terms. The statute never intended that an individual could secure a lien because another had given a notice which was effectual only as to the person giving notice.

Argued orally by *R. P. Willing,* for appellant, and by *O. W. Catchings,* for appellee.

FLETCHER, J., delivered the opinion of the court.

Appellant, a dealer in builders' supplies, filed a petition in the circuit court of Warren county against the Jaffray Construction Company and one Dr. J. B. Askew, Jr., seeking to enforce a materialman's lien upon a building constructed for Askew by John H. Jaffray, a contractor doing business under the style of the Jaffray Construction Company. From a peremptory instruction in favor of Askew, the supply company appeals.

The effect of the judgment of the circuit court was to release the building from any lien. Judgment by default was taken against Jaffray; he having made no defense to the action. The case tried in the circuit court seems to have turned entirely upon the question whether a certain letter written by appellant's secretary and manager to appellee Askew was sufficient notice under section 3074, of the Code of 1906, to bind the hands of Askew and in favor of appellant any amount which Askew at that time owed to the contractor. We deem it unnecessary to consider here the question of what amount was really due, at the time of the alleged notice, or whether any amount that might subsequently become due could be affected by the notice. Nor do we deem it essential to the decision of the case, as we view it, to consider the contention that the sum named in the alleged notice was subsequently paid. We may assume, for the purposes of this decision, that Askew owed Jaffray, at the time the letter of October 15 was written, more than the sum of $842; that being the amount mentioned in the letter. We purpose to consider only the effect of the notice. Many objections are

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urged to the sufficiency of this letter as notice, but we confine this opinion to one which we think renders the notice fatally defective.

The letter recited: "As far as the millwork bill of $842 is concerned, the balance of this material was delivered yesterday, and as we act simply in the capacity of agents for the shippers, Messrs. John A. Gauger & Co., of Chicago, Ill., we beg to advise that the amount of this bill, $842, will be due from this contract, and you will govern yourself accordingly." It should be remembered that, in this phase of this case, Askew had no contractual relations whatever with appellant, and appellant could secure a lien or subject Askew to personal liability only by giving notice under the statute. His case must therefore stand or fall upon the notice. Now it is evident that the notice does not inform Askew that anything whatsoever is due from Jaffray to appellant. On the contrary, there is a distinct and unequivocal declaration that the debt is due, not to appellant, but to appellant's principal, Gauger & Co. Can it be said that, when Askew was notified that Jaffray owed Gauger & Co. certain moneys for materials, a lien thereby arises in favor of appellant, an altogether distinct and separate concern? The lien is what is here sought to be enforced, and this lien arises only from the fact of written notice, and that solely by virtue of the statute. In order to avail one's self of the provisions of the statute, one must bring himself within its terms, either literally or by fair intendment; and surely the statute never meant that one individual could secure a lien because another had given a notice which was effectual as to the person giving notice. It is said, however, that the notice was sufficient in favor of Gauger & Co., for whom appellant claimed to be acting as agent, and that appellant, having paid Gauger in full, is now subrogated to whatever rights were by the notice secured by Gauger & Co. But the trouble with this contention is that as a matter of fact Jaffray never owed Gauger & Co. anything, and consequently Gauger & Co. never at any time had any rights to which appellant

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could be subrogated. We are clearly of the opinion that the written notice was insufficient, and that appellant acquired no lien thereby.

It is here argued that the peremptory instruction was improper upon another distinct and independent ground. It is said that the secretary and manager of the appellant company testified to facts which tended to show that appellant and Dr. Askew had entered into an independent contract in regard to the millwork, by which Askew bound himself directly to pay appellant the amount sued for, and that therefore appellant came into such contractual relations with the owner that a lien arose by virtue of a sale of materials direct to the owner; that in this aspect of the case the notice was immaterial, and the suit was maintainable regardless of such notice. There is force in the contention, and it might prevail, if the course of the trial in the circuit court permitted that argument to be made in this court. But an examination of the petition clearly shows that no such issue was submitted to the circuit court. The suit was manifestly one to enforce a lien secured by notice. This view as to the distinct liability of Askew is entirely inconsistent with any liability by Jaffray. Askew and Jaffray cannot be jointly liable. If Jaffray is primarily liable, and Askew secondarily so, as a surety or guarantor, then the undertaking of Askew, not being in writing, is within the statute of frauds. So that appellant's only hope is to hold Askew alone liable for this particular bill for millwork, and this necessarily involves the release of Jaffray. And yet there is suit and personal judgment against Jaffray, there is an express averment that Jaffray owed the $842, there is a recital as to the notice discussed in a previous part of this opinion, and a prayer that the debt be established as a lien from the date of the notice. There can be no doubt that the whole proceeding was an effort to enforce a lien obtained by notice. We reiterate what has so often been said by this court, that parties must in this court abide by the issues made in the lower court by the pleadings and proof.

Affirmed.

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BRODIE REASON v. STATE OF MISSISSIPPI.

[48 South. 820.]

CRIMINAL LAW AND PROCEDURE. *Evidence. Confessions. Second Confession. Presumption.*

A confession extorted by threats is not admissible in evidence, nor is a subsequent one unless the influence of the threats be shown to have been wholly removed.

FROM the circuit court of Marshall county.

HON. WILLIAM A. ROANE, Judge.

Reason, appellant, was indicted, and tried for and convicted of the murder of his father, Henry Reason, sentenced to the penitentiary for life, and appealed to the supreme court.

The state failed to prove by any eyewitness that appellant committed the homicide; appellant himself denying that he was guilty of the crime. The conviction rested, aside from the confession hereinafter mentioned, on the testimony of his younger fourteen years old brother, Frank Reason, to the effect that appellant had made threats against his father shortly before the killing, and shortly after the fatal shot ran from the house in which the killing occurred. This witness had, however, twice previously testified altogether differently, affirming that appellant was not guilty. The state also introduced testimony of an alleged confession by appellant to the sheriff and his deputies, which appellant contended was extorted by threats.

D. M. Featherston, for appellant.

Appellant testified, without contradiction, that his original confession of guilt was extorted from him by threats to the effect that if he did not admit his guilt he would be hanged as soon as he reached Holly Springs. While this original confession was not admitted in evidence, the court below erroneously

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Brief for appellee.

permitted the state over appellant's objection to show that it was reiterated when the prisoner reached Holly Springs. This was error. *Whitley v. State,* 78 Miss. 255, 28 South. 852.

A confession of guilt to be admissable in evidence must be free and voluntary, not extorted by fear or induced by threats or personal violence or hope held out by promise of reward. *Peter v. State,* 4 Smed. & M. 31; *Van Buren v. State,* 24 Miss. 512; *Simon v. State,* 37 Miss 288; *Whitley v. State,* 78 Miss. 255, 28 South. 852; *Smith v. State,* 72 Miss. 420, 18 South. 422; *Ammon v. State,* 80 Miss. 592, 32 South. 9; *Mackmaster v. State,* 82 Miss. 459, 34 South. 156; *Banks v. State,* 47 South. 437.

George Butler, assistant attorney-general, for appellee.

It is true that there is some testimony that the confession was extorted by threats. But the extorted confession was not offered in evidence. The confession proved on the trial was subsequently made in the jail at Holly Springs. Accordingly, the cases cited by the learned counsel for appellant are not in point. The competency of the evidence was determined by the trial court. The court heard all the facts and circumstances relating to the confession and after a full hearing decided that the sheriff's testimony in regard to the confession should be admitted. In the case of *Simmons v. State,* 61 Miss. 243, this court held that the jury has nothing to do with the competency of the confession. Be that as it may, the instructions to the jury covered the matter, and this court will readily see that the instructions rectly announced the law.

Argued orally by *J. C. Longstreet,* for appellant, and by *George Butler,* assistant attorney-general, for appellee.

FLETCHER, J., delivered the opinion of the court.

This conviction rests on the testimony of Frank Reason and the alleged confessions of appellant. There can be no doubt

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that Frank Reason's testimony is greatly weakened by the fact that he had twice previously testified that appellant was not guilty. This being conceded, it was of the first importance that appellant should not have his case prejudiced by the admission of incompetent testimony. Now, appellant testifies, without pretense of contradiction, that his original confession was extorted by threats to the effect that if he did not admit his guilt he would be hanged as soon as he reached Holly Springs. It is true this original confession was not admitted in testimony, but the court permitted the state, over appellant's objection, to show that the original confession was repeated and confirmed at the very instant the prisoner reached Holly Springs. It is too plain for argument that this reiterated confession was induced by the same cause that underlay the first confession, since the danger of immediate death at Holly Springs could, in the opinion of the prisoner, be averted only by adhering to his story. The case falls within the principles of *Whitley v. State,* 78 Miss. 255, 28 South. 852, 53 L. R. A. 402, where it is said: "Where a confession is made under the influence of threats, such influence is presumed to continue until removed by evidence, and a subsequent confession will not be received, unless the influence of the first confession is shown to have been totally done away with, by a warning of the consequences of a confession, or by other means." See also the cases of *Banks v. State,* 47 South. 437; *Durham v. State,* 47 South. 545.

Reversed and remanded.

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Syllabus.

WILLIAM M. BALL v. WILLIAM HUNT PHELAN ET AL.

[47 South. 956.]

1. WILLS. *Construction. Intention of testator.*

In construing a will the court must ascertain the intention of the testator from the whole scheme of the instrument, giving due weight to every word of it.

2. SAME. *Devises by implication. Validity.*

There can be no devise by implication violative of law or public policy.

3. SAME. *Same.*

A devise by implication must be predicated of a necessary implication, and the probability of testator's intention to make the gift must be so strong as to exclude the idea that the contrary intention existed in his mind.

4. SAME. *Same.*

The rule that a testamentary gift to a person and in case he die without leaving children to another does not raise an implied gift in the children applies only where the first taker is given an absolute interest in the property.

5. SAME. *Construction. Intention of testator.*

The court in construing a will may assume that testator, dictating the will under the influence of family relations, will seldom intentionally cut off the issue of a son or daughter from taking the share of the parent for the benefit of collateral objects.

6. SAME. *Devise by implication.*

Where a will necessarily confines the interest of a child of testator to his life, the court will lay hold of slight circumstances to raise a gift in the issue of such child, and thereby avoid imputing to the testator the intention of giving the property to the devisee over, leaving no provision for the issue of the tenant for life.

7. SAME. *Same.*

Courts will more readily sustain a devise by implication to children on arriving at age or marriage, where some beneficial interest has been given them during minority, than where no interest of

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Statement of the case.

any kind has been given them, but whether a devise by implication is to be maintained or not cannot be determined by such test alone.

8. SAME. *Construction. Law governing.*

Though title to real estate is governed solely by the law of the place where the property is situated, yet, where the inquiry is directed to the ascertainment of the intention of the testator from the language of his will, the *lex domicilii* controls.

9. SAME. *Same.*

Where a testator has used in his will technical terms to which the courts of his domicile have attached a settled judicial meaning constituting a rule of property in that state, the courts of other states construing the testament will give to such words the same meaning.

10. SAME. *Same.*

Where the intention of testator violates no law, it stands; but where it violates the law, the will fails unless the legislature has arbitrarily provided, or the courts have by long construction determined, that a certain meaning shall be given to certain technical terms used in the will, which meaning will save the will, though it may result in a different disposition from that which testator intended.

11. SAME. *Same.*

Where testator gave half of his property to his wife for life, then to his daughter, and the other half to the daughter for life, and provided that on her death without issue, or on the death of the issue before marriage or becoming of age, the whole property given to the daughter "all for life" should go to others. The daughter took only a life estate, which could not be enlarged by construction into a fee on the birth of issue, and her children by implication took the fee.

FROM the chancery court of Tunica county.

HON. PERCY BELL, Chancellor.

William Hunt Phelan and others, appellees, were complainants in the court below; William M. Ball, appellant, was defendant there. From a decree overruling defendant's demurrer to the bill of complaint, the defendant appealed to the supreme court. The opinion of the court states the facts.

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Brief for appellant.

Julian C. Wilson and *W. A. Percy,* for appellant.

It is immaterial whether the daughter, Julia, mentioned in the second and third items of the will of William R. Hunt, deceased, took a fee defeasible on dying without children or in case her children should die before marrying or becoming of age. As this daughter, Julia, was the sole heir of William R. Hunt, and the appellant, Ball, is shown to have a conveyance from Mrs. Sarah E. Hunt, the widow, and Julia, the daughter, then in either event Julia, having conveyed her interest, would have cut off the inheritance of her own children by her deed. In other words, any claim of appellees must be under the will as purchasers.

If Julia took a fee, either defeasible or absolute, under the will, or, if she, as heir of her father, inherited the part undisposed of, then the appellees could only claim from her by descent and are barred by her conveyance through which appellant claims. *Harris v. McLarin,* 30 Miss. 535; *Halsey v. Gee,* 79 Miss. 193, 30 South. 604.

There can only be five possible constructions to this will as to the estate devised. They are:

(1) An estate to Julia for life, and to her heirs after her death, with limitation over in default of children or in the event of children dying unmarried. As words of inheritance were not necessary to convey a fee, and as the rule in *Shelley's case* was in force in Mississippi in 1872 when the testator died, this construction would have given Julia a fee-simple estate. In this event, her deed conveyed such estate to appellant and thus would dispose of appellees' bill and have the effect of sustaining the demurrer. (2) The second construction is that an estate was devised to Julia for life and to the heirs of her body after her death, and, in default of such heirs, then over. The probability of this being the intention of the testator is very strong because of the provision in the second item of the will that Julia's husband was not to inherit in any manner whatever. This would create an estate tail under the rule in *Shelley's case*

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then in force, and under the statute in Mississippi such estate tail would become a fee-simple to Julia, and her death would bar her heirs, the appellees, now suing. This also would have the effect of sustaining the demurrer to the bill. *Presgrove v. Comfort,* 58 Miss. 655; *Harris v. McCann,* 75 Miss. 822, 23 South. 631. (3) The third construction is that an estate was devised to Julia for life and to her issue after her death, and in the event that she died without issue, or if the issue died under age or unmarried, then over. If, under the decision of *Jordan v. Roach,* 32 Miss. 500, the word "children" does not mean issue, then it must be the intent of the will that, if Julia had a child who died in her lifetime leaving children, these children are cut off in favor of the niece of the testator's wife. If on the other hand the word "children" refers to issue, then Julia's grandchildren surviving their parent, who died before Julia, would inherit the property in preference to Betty Hunt Selden. This would accomplish the purpose the testator expressed that Julia's husband should not inherit in any manner, because it would mean a general failure of issue. In any event, if Julia's grandchildren take in preference to Betty Hunt Selden, the provision in the will would read thus: "in case Julia die without issue, or the issue die before coming of age or marrying, then the property is to go to Betty Hunt Selden." If this is the meaning of the will, the failure of issue mentioned is an indefinite failure of issue, and is an implication of an estate tail, if anything. 1 Underhill on Wills, § 471. This construction would vest the fee-simple title in Julia under *Jordan v. Roach, supra,* and under the statute making estates tail estates in fee-simple. Therefore the death of Julia would bar her heirs and the demurrer would be sustained. (4) The fourth construction of the will would be that an estate was granted to Julia only for life with contingent remainder to Betty Hunt Selden. If the contingency should never arise, there must be a case of partial intestacy as to the remainder upon the death of Julia. If this event Julia as heir, had the reversion. As she disposed of it by her deed the title became vested in Ball, and thereby her

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Brief for appellant.

heirs, the appellees, are barred from inheritance. This of course would also sustain the demurrer to the bill. 1 Redfield on Wills, 454. (5) The fifth possible construction of the will is that the other constructions and theories above mentioned are morally impossible, and that the will expressly gave a life estate to Julia, and expressly provided for every other contingency, but that there was left to unavoidable implication a remainder to the children of Julia in fee. If this should fail, then the bill must fail.

There are disclosed no devises or gifts of any character to the children of Julia and no evidence that in any event they were to be the objects of the testator's bounty. The only mention of them is by way of prevention of inheritance of property by Julia's husband, even through them or for lack of them. This furnishes the clue to the mention of children in the will, and seems a bar to the implication of a devisee which can only arise where no other intention is supposable in the mind of the testator. 1 Underhill on Wills, 112; 1 Redfield on Wills, 434; 30 Am. Eng. Ency. Law (2d ed.), 697; 2 Jarman on Wills, 115.

The will was carefully drawn, and written item by item. It contained no statement of intention to dispose of all of the testator's property. No solicitation is expressed therein for the children of Julia. Julia, when the will was made, was unmarried, hence the testator did not know whether he would ever have any grandchildren, and certainly he could have had no personal affection for them. Furthermore, the will was made in Tennessee, and shows a careful avoidance of the common law and of all the Tennessee rules against perpetuities. Next to a provision for his wife and a provision for Julia, the testator's leading idea seems to be the prevention of Julia's husband ever taking this property by his marriage or inheritance. Considering that the will was so carefully drawn, it would be a very dangerous thing for a court after all these years to ascribe to the testator an intention which he did not express. *Caldwell v. Willis,* 57 Miss. 571.

The testator lived in Tennessee, owned property there, and

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in his will must be supposed to be speaking in view of the Tennessee law. In determining the intention of the testator the law of the state of his domicile will control, not only as to personality but as to realty. Wharton on Conflict of Laws, 2 vol. 1336; *Crusoe v. Butler,* 36 Miss. 173; *Wilson v. Cox,* 49 Miss. 543; *Adams v. Farley,* 18 South. 391. In Tennessee the husband of a married woman takes an estate by curtesy in a determinable fee. *Crumley v. Deake,* 67 Tenn. 673.

In this will there are only three expressions from which the implication of an estate to the children of Julia can by any possibility arise. They are: 1. The provision in the second item that the husband of Julia was not to inherit through the death of any child or children they may have, or in any manner whatever. 2. The provision in the third item that in case Julia should die without child, the property should go to Betty Hunt Selden. 3. The provision in the third item that in case the child or children should die before marrying or becoming of age, the property should go to Betty Hunt Selden.

The first provision is easily explainable on the ground that the testator was providing against the possibility of an inheritance of Julia's future husband from her future children, in the event they should inherit from Julia as her heirs, if Julia should die first leaving children.

In the second provision just mentioned, if Betty Hunt Selden had been the heir of the testator, and Julia not the heir, the estate by implication would have arisen in the children, because as the heir was not to have the property if children were alive, no one but the children could take it. This would have been necessary implication. As Betty Hunt Selden was not his heir, and his heir could take the reversion if the children did survive, an estate by implication does not arise. The intent to benefit the children as purchasers is only conjectural, which is never sufficient to create a devise by implication. An intent that they should inherit from their mother as her heirs is equally probable. If it is even possible, there would be no

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estate by implication. *Norfleet v. Callicot,* 90 Miss. 227, 43 South. 616; 1 Underhill on Wills, 622; *Kinsella v. Caffrey,* 11 Irish Ch. 154.

The third provision, above referred to, under which the implication of an estate to the children of Julia can by any probability arise, is a prevention making a gift to Betty Hunt Selden, a stranger to his blood, dependent on an alternative event. In the contingency of Julia dying without child, or if any child surviving her should die unmarried before reaching majority, Betty Hunt Selden should inherit. But for this provision in the second item of the will, if Julia died and her children inherited from her, the children could neither devise the property until they should arrive at their majority, nor have issue to inherit it until they were married.

It will be noted that the children are mentioned in all three of the items to prevent an inheritance from Julia, if she died without children, and to prevent an inheritance from them in the event they should die unmarried before reaching the age of twenty-one years.

An examination of the authorities will show that, even where no other plausible intention is suggested for the testator, they do not raise an estate by implication to the children from a will, to one for life, and on death, without issue, or the issue dying under age or unmarried, a limitation over. It is a contingency upon which the limitation over takes effect, and is an entirely different case from a conveyance to one until children become of age or marry, or a gift to children until they become of age or marriage; and in the event of death under age, or unmarried, over.

In this case, there is no gift anywhere to the children, nor is the property held for them, nor until a certain time. But there is a bare contingency that the property go to Betty Hunt Selden, in the event they die before they can have issue or dispose of the property. The object of which is made clear by the express desire to prevent inheritance by the father of the chil-

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dren. It is conceded that if Betty Hunt Selden were the testator's heir, there would be an implication because if the heir was not to take, if the children survived and married, then the implication would be necessary and unavoidable that the children took. As Betty Hunt Selden was not the heir, the implication is not necessary, and, therefore, does not arise. Jarman on Wills, 126.

No case can be found in a will like this which will support a gift by implication, simply because the testator provided for a disposition of the property in the event that the children of his heir die under majority and unmarried, and the cases which approach it are all decided upon some other principle. They are either supported by the context of the will, by a charge against the supposed devisees, by a gift over to the heir, by the claimed devisee having already an estate in the property to be enlarged, by at least his being the object of the testator's bounty as to the property claimed in the will itself, or some other circumstances other than being mentioned in a contingency so readily explainable.

Under the decisions of *Owen v. Hancock*, 38 Tenn. 564, and *Nott v. FitzGibbon*, 107 Tenn. 54, this cause must be remanded. We especially urge the court to examine the many citations referred to in these two Tennessee decisions.

The mention of the children of the daughter, Julia, three times in the will does not, under any of the authorities, and especially under the Tennessee law, which controls, give an estate by implication to those children. The fact that Julia was testator's sole heir, and Betty Hunt Selden not his heir, differentiates this case from any where an estate by implication has been sustained, and from any desire of the court to seize upon indications to raise such an estate, unless such indications, are conclusive of the testator's intent.

The statement in the two items, to the effect that the husband was not to inherit from the children, was made to prevent an inheritance from them, taking as heirs of his daughter, Julia, but

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Brief for appellant.

the provision against the husband's taking by reason of Julia's death, from her, conclusively shows that Julia's estate was not limited to a life estate, in the mind of the testator. The statement that if Julia died without children Betty Hunt Selden should take is not sufficient to raise the devise by implication, as expressly adjudged in Tennessee.

The provision that Betty Hunt Selden should take in the event the children died under age and unmarried, was but another condition against inheritance by Julia's husband, and was a condition on which an estate was to vest, and not the giving of an estate.

An implication to be sustained must be unavoidable, necessary and according to Lord Elden, so strong that no contrary intention can be supposed to have existed in the mind of the testator. It is sufficient to defeat it, it seems, if another intention can be imagined. The other intention is offered in this case, as shown by the will itself, which is that the purpose was to cut off the marital rights and curtesy of the husband of Julia, to cut off an inheritance from Julia dying without children, and prevent inheritance from the children before they arrive at an age to dispose of the property themselves, or, in the event they died before they could have children of their own. In other words, it is apparent that the whole scheme of the testator was to bestow his property on his daugher, and prevent the inheritance going out of his own and his wife's family. And it is immaterial whether the will was drawn by a lawyer who correctly carried out the intent, or by the testator who was endeavoring to make it more certain. The intent is still made clear, instead of possible or probable. In view of this intention on the face of this will, it is submitted that to raise the devise by implication is not only to make a will not expressed by the testator, but one he no doubt avoided.

The entire argument of counsel for appellees is based upon the assumption that if the devise by implication is not sustained, it necessarily follows that the testator died intestate, as to a part

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of his property, towit, the remainder after the death of Julia Phelan, in the event which did happen, and they are, therefore, arguing against intestacy. This premise is by no means correct, it is respectfully submitted.

Counsel for appellees reply on two decisions, one of which *Ex parte Rogers,* they concede is contrary to subsequent decisions in England, where it was rendered. It is also opposed by the two Tennessee cases, *Nott v. FitzGibbon,* and *Owen v. Hancock,* and the Mississippi case of *Halsey v. Gee,* above cited, and also by *Anderson v. Messenger,* 146 Fed. 929.

A great many of the cases cited for the appellees have been cases where estates were enlarged by implication, as in the Tennessee cases, *supra,* and none of them were cases where an estate was created by implication, under the circumstances of this case. How it is possible to align the Tennessee courts, which decided against an implication in the children, with *Ex parte Rogers* and *Anderson v. Messenger,* which raised such implication on their particulalr facts, it is impossible for us to see.

There is no elliptical form of expression in this will, no line left out of it and there was no estate to the children, to be enlarged, and the children are nowhere in the will the objects of the testator's bounty; the gift over is not to the heir, but the first taker was the heir, which must differentiate this case from all the cases cited by opposing counsel.

L. B. McFarland and *Tim E. Cooper,* for appellees.

The question here for decision is whether, by the will of William R. Hunt, there was by implication a limitation of an estate over to the child or children of Julia A. Phelan after her death. We concede that there is not an expressed limitation of such an estate to the children of Julia A. Phelan; our contention being that the fee was limited over to such children by necessary implication. We insist that an estate was limited over to the children of Julia A. Phelan.

There are three things apparent from the will. First: Only

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a life estate was given, in any event, to Julia. Second: There was an exclusion, by the terms of the will, of all the marital rights of any husband that Julia might have and especially an exclusion for him to inherit it through the death of any child or children they may have. Third: There was a limitation over to Bettie Hunt Selden in event that Julia A. Phelan should die without child or children, or in event such child or children should die, (*a*) before marriage; or (*b*) before becoming of age. It is to be noted just here that by his will, William R. Hunt, made ulterior limitations in either of the above events; first, to Bettie Hunt Selden and if she should die before marriage or becoming of age, a limitation over to Julia Moore Driver of one-half and the other half to be divided between the children of his sisters, Maria L. Joyner and Leona E. Thompson. Of course, neither of these limitations ever became effective, because Julia A. Phelan left surviving her two children who have reached the age of twenty-one years. We mention these remote limitations for the purpose of showing the manifest intention of the testator not to die intestate as to any interest in his estate, but to devolve all interest in the estate through a number of remote limitations. It is quite clear that nothing but a life estate was given to his daughter Julia, which was not enlarged into a fee by the limitation over to others if she "should die without child or children, or such child or children should die before marriage or before becoming of age." Unless, therefore, there was a limitation by implication to the child or children of Julia, then upon the coming of age or marrying of any such child or children, the ulterior limitations to others being cut off thereby, there was a resulting intestacy as to the remainder in fee and Julia took it by descent and not by the will.

That wills are more liberally construed in this country than in England is pointed out in the case of *Anderson v. Messenger*, 146 Fed. 929. We ask the court to bear in mind this existing state of the law in England and the United States in considering the cases hereinafter cited, whether in one jurisdiction or the

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other. We concede, of course, that where the words of the testator are such such as to have received a settled and uniform construction there is more difficulty in establishing an estate by implication in opposition to the technical meaning of words, the construction of which is well settled by authority. The meaning of the word "children," is so firmly and uniformly settled as including legitimates alone that not only will no estate be considered as limited to illegitimates by implication, but they will be held to be excluded by implication even though it be manifest or very probable that the testator intended to make provision for them. 2 Jarman on Wills, §§ 1076–1114; *Abbott v. Essex Co.*, 18 How. 202.

Devises by implication are often defeated by the invocation of technical rules of construction, by the operation of which a manifest understanding of the testator is thwarted under the statement that though estates may be limited by implication, the implication must be a necessary one and that an implication is not a necessary one, when, by looking at the will from a technical standpoint some other possible meaning of the testator can be discovered.

The first rule of construction which we invoke, is that if the will is susceptible of two constructions by one of which the testator disposes of the whole of his estate and by the other a part only, the courts will prefer that construction by which the whole estate is disposed of if this construction is reasonable and consistent with the general scope and provisions of the will. Page on Wills, § 466; Jarman on Wills, § 809, note 29. Where an estate is limited to one and at his death without child or children a limitation to another is made, this alone creates an estate by implication in the children of the first taker. This was decided in *Ex parte Rogers*, 2 Maddox, 449, to be the rule. In that case, a testator, by his will had bequeathed £1,000 to his niece. By a codicil reciting that she had married indiscreetly, and that he intended to withdraw the

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Brief for appellees.

legacy out of her power to dispose of it and out the power of her husband to do so, he directed his executors to secure to the said niece the interest of the said £1,000 independently of her husband, by placing out that sum in trust for his niece, she to enjoy the interest or dividends during her life and at her decease without child or children, the principal and interest to be divided between such of her sisters as should then be living. It was held by the vice-chancellor that the children took a legacy by necessary implication. It may be conceded that the authority of this case has been shaken by subsequent decisions in England.

There is a rule of universal application which we invoke, which is that, where there is an estate limited to one and if he dies without children or child, over to another, the courts will explore the whole will and lay hold of slight circumstances to raise a gift to the children. As Mr. Jarman says, by doing so, "avoiding imputing to the testator so extraordinary an intention as that the devisee or legatee over is to become entitled if the first taker have no children, but that the property is not to go to the child, if there be one, or to its parent."

If there is no estate by implication given in the will to the children of Julia A. Phelan, then the fee would pass in different directions as she might, or might not, have children who would reach the age of twenty-one years or marry. If she did not have such children, the estate would go to Bettie Hunt Selden by the first limitation and after her to the children of the two sisters of William R. Hunt. But if Julia had children who should arrive at the age of twenty-one years or marry, then unless they take an estate by implication the fee would fall into the residuum of the testator's estate and pass to Julia in fee by descent, or by implied devise. Now precisely this test has been held to be sufficient to raise an estate by implication in England. *Cropton v. Davies,* 4 L. R. Common Pleas Cases, 159; and see also *Kinsella v. Caffrey,* 11 Irish Ch. 154; 1 Jarman on Wills, 557; Theobold on Wills, 738; *In re Rawlings' Trust,* L. R. 45 Chan.

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Div. 299; *Tompkins v. Tompkins,* 1 Burr. 234; *Gardner v. Stevens,* 30 L. J. Chancery, 199; *Wilkes v. Williams,* 2 J. and H. 125.

In *Goodright v. Hoskins,* 9 East, 306, the testator gave an estate to his son Richard until the latter's eldest son Thomas should attain twenty-one years, and no longer. If Thomas should die in his minority, the estate was to go to his younger brothers John and Richard, or either of them who should attain majority; and the testator added, "and I desire the said premises may be quitted and delivered as aforesaid by my said son Richard Hoskins accordingly." It was held that Thomas upon arriving at majority, took the fee by implication.

In *Thorpe v. Owen,* 2 Hair, the testator directed that "everything should remain as it now is," during the life of his wife and this was held to give the wife a life estate by implication.

In *Sweating v. Prideaux,* 2 Chan. Div. 413, the testator devised £16,000 in trust to invest the same and pay the income from £8,000 a part thereof, to his daughter, Anne, for her life on her separate receipt and after her death to divide the £8,000 among her children at twenty-one years of age; and directed his testators to pay the income from the remaining £8,000 to his daughter, Sarah, for life in the same manner in every respect and subject to the same control as directed to his daughter Anne; it being his intention that the said daughters' fortunes should not be subject to the control or debts of their husbands. The will made no provision as to any division of the capital among the children of Sarah. The testator gave to the same trustees a sum of £6,000 to invest and pay the income to his son for life and to divide the principal among the son's children, and gave the trustees power to apply the income of both funds for the maintenance and education of the daughters' and son's children. It was held that upon the death of Sarah, her children were entitled by implication to the sum of £8,000.

It is well settled in numerous cases that a devise or bequest

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to a widow for life if she shall not marry, and if she shall marry, then over to another person, gives the remainder after death of the widow to such person by implication even if she does not marry. *Re Vowers,* 113 N. Y. 569; *Grout v. Hopgood,* 13 Pick. 164; *Marks v. Hague,* 1 Ed. Chanc. 174; *Abbott v. Middleton,* 21 Beavan, 143; *Aspey v. Lewis,* 152 Ind. 494; *Boston Safe Deposit Company v. Coffin* (Mass.), 8 L. R. A. 740; *Metcalf v. Parish of Framingham,* 128 Mass. 375; *Luxford v. Cheeke,* 3 Lev. 125.

In the will of William R. Hunt, there is a manifest expression of his opinion that he had given some estate to the children of Julia. The estate given to Julia was expressly limited to a life estate. He did not intend to give her more than that. The case is, therefore, free from any suggestion that Julia was to have the fee on condition that she died leaving children whether the children should or should not reach the age of twenty-one years or marry. It is apparent that the testator thought that, by by the terms of his will, the children of Julia would take some estate, for he not only excludes from the control of any future husband of Julia the estate which he gives to her, but expressly provides that such husband is not to inherit through the death of any child or children they may have or in any other manner whatever.

There are other circumstances than those we have referred to, upon which the court will lay hold to create by implication the estate in favor of such children. We have only referred to the classes of circumstances which we think bear on the phases of this will, and it is sufficient for us to recapitulate our propositions, which are:

First—That where, as here, the will of the testator shows a purpose to dispose of his whole estate, such construction will be adopted, if possible, as to prevent intestacy in reference to any part of it; and we submit that the will in this case shows a purpose of the testator to dispose of his whole estate and that

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he has given to his daughter, Julia, what estate he intended for her to have and did not intend for her to take anything by his partial intestacy.

Second—That where the limitation is over to a third person not related to the testator in blood the court will so construe the will as to preserve the bounty of the testator to his own descendants, if the language of the will permits such construction. And we show here that the children of Julia were intended to take, or the estate was given over to strangers of the blood.

Third—Unless the children of Julia take an estate, then the fee will pass in different directions as such children may or may not reach the age of twenty-one years or marry. This has been held a sufficient circumstance alone to raise a devise by implication.

Fourth—Where the limitation over to the third person is not only upon the default of children, but that such child shall die under twenty-one years of age. This circumstance is sufficient to raise an estate by implication, as expressly decided in *Kinsella v. Caffrey, supra,* which case was approved by the English court in L. R. 45 Chan. Div. 299.

Fifth—Where, from a reading of the whole will, it is apparent that the testator thought he had given an estate to the children. *Marsh v. Hague,* 1 Ed. 174; *In Re Vowers,* 113 N. Y. 569; *Abbott v. Middleton, supra; Aspey v. Lewis, supra; Metcalf v. Parish of Framingham, supra.*

It is said by counsel for appellant that the decisions of the supreme court of Tennessee in the cases of *Owens v. Hancock,* 1 Head, 564, and *Nott v. Fitzgibbon,* 107 Tenn. 54, are decisive of this case. But inasmuch as we look to the law of the domicile for the purpose only of finding the intention of the testator, and as his intention is supposed to be disclosed by the decisions of the courts of his state, and since only those decisions which had been rendered by the supreme court of Tennessee before his death could possibly have been known to him, the case of *Nott v. Fitzgibbon* would not throw any light upon the

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subject. But without stopping to contend against the effort of that decision, we take up the Tennessee cases as a whole and proceed with the investigation.

In *Owens v. Hancock,* supra, this rule and this only seems to be announced, viz.: That where an estate generally or for life is given to one, and if he dies without "issue" or "without heirs of his body," there is a limitation to a third person, the courts will, by implication,—that is, for the purpose of carrying out the apparent but not expressed will of the testator—convert the estate of the first taker into a fee tail, which, in its turn is, by the statute of Tennessee, converted into a fee-simple. The result reached is a curious one when we look to the reasoning by which the courts were originally controlled. As is stated in 2 Brown's Chancery, the reason is that the courts presumed that the testator intended that the first taker should hold the estate both for himself and for his issue, and so, in order that this may be done, the estate is converted into a fee tail. It would seem that when the statute forbids fees tail and converts them into fees simple, the reasoning from which the implied devise is raised would fail. For certainly, where the first taker takes the fee simple, he does not thereafter hold anything *per formamdoni* for his issue.

The contention of opposing counsel that a devise for life to A, and, if A dies without issue, over to B, will give by implication the fee to A, includes, of course, the concesison that Mr. Hunt never intended for the fee to pass by his intestacy as to it. So the question is, whether since the court must imply a devise of the fee, it will imply a devise to Julia, or to such of her children as reached "the age of twenty-one years or marry." We think that upon reading the will the court will readily see that it was not drawn by a lawyer. If, as opposing counsel insist, the testator drew this will in the light of the Tennessee decisions, then he must have known that when he gave a life estate to Julia, and provided that it should go over to Bettie Hunt Selden upon the death of Julia without issue, that if Julia die

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without issue, the estate would belong to her by an implied devise in fee tail, which the statute converted into a fee simple. If this was the purpose of the testator he would have stopped just there, especially if he had been the accurate and learned lawyer which opposing counsel insist that he was. The decisions of the supreme court of Tennessee align that court directly with the court which decided the case of *Ex Parte Rogers, supra,* and the Circuit Court of Appeals which decided the case of *Anderson v. Messenger,* to the effect that a simple devise to one, either generally or for life with a limitation over if such one die without issue, gives rise to an implied devise and that the testator does not under such circumstances die intestate as to the fee in the property thus named.

The rule in *Shelley's case* was abolished at an early day in Tennessee and so the court, in the cases cited by opposing counsel fell back upon an implied devise. But in neither of these cases has the supreme court of Tennessee laid down a rule which is at all controlling of the devise in the case now before the court.

In *Owens v. Hancock, supra,* the limitation was "to Mary Cooper during her life and if she should die without heirs of her body," etc. In *Nott v. Fitzgibbon, supra,* the devise was to James Fitzgibbons for life, "and if he should die without issue, over," etc. In both of these cases words are used from which an estate tail can be inferred, for if the gift is to one and the heirs of his body or issue, they are typical of estates tail. And so, we say of the decision in Tennessee that they may all be reduced to this rule: that where an estate is given to one for life, and upon his death without issue or without heirs of his body, the estate is limited over to a third person, the court will imply a further devise, to wit: a devise in fee tail, which the statute law of Tennessee should convert into a fee simple. How these decisions can be invoked as creating an estate in fee in Julia under the will of Mr. Hunt, we confess our inability to see. They do decide that where an estate for life is given

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Brief for appellee.

to the first donee and there is a limitation over if the life tenant should die without issue or heirs of his body (words of indefinite failure of issue at common law), the court, by implication, will convert the estate into a fee tail. The court in these cases, relying upon the common-law decisions where death "without issue or without heirs of the body," meant an indefinite failure of issue, applied the same rule, although under the statute of Tennessee, the words "dying without issue," mean a definite failure of issue, to wit: A failure of issue at the death of the testator. It is apparent that these decisions can have no influence in determining that the implied devise will be to the life tenant rather than to his children, where the limitation over is upon the death of the life tenant, "without children or if the children die unmarried and before the age of twenty-one years.

It is, of course, useless for us to say that the words "child or children dying before mariage or twenty-one," are words of purchase and not limitation. It is true that in *Jordan v. Roach,* 32 Miss. 481, it was held upon the whole context of the will in which the testator had used "issue" and "children" interchangeably, the word "children" was synonymous with "issue;" but it was the peculiar provision of that particular will that led to that construction. The words "children who shall reach the age of twenty-one or marry," are so clearly words of purchase and not of limitation, that we decline to involve ourselves in any consideration of the rule in *Shelley's case*: *Cannon v. Barry,* 59 Miss. 289; *Tate v. Townsend,* 61 Miss. 316.

Counsel for the appellant seek to evade the strength of the contention that the testator, Mr. Hunt, thought that he had given an estate to the children of Julia, as evidenced by the provision that their father should, in no event, take inheritance from them. Counsel say that what this learned lawyer meant by this item of his will was, that the father of the children of Julia should not take by descent any estate which these children might take by descent from Julia. The fallacy

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of this reply is obvious. What the testator was attempting to do by this clause of the will, was to impose limitations upon estates which he was giving by the will and not limitations upon estates which he did not intend to give by the will and which might be taken by descent. This would be a complete reply, as we submit, if the court should be of opinion that the will was drawn by a skilled lawyer. But, as a matter of fact, it is perfectly clear on the face of the will that it was not drawn by a lawyer.

The suggestions made by counsel as to what was running in the mind of Mr. Hunt, are, it seems to us, fanciful. They are the product of a subtle and trained legal mind, invented to escape a palpable but blunderingly expressed purpose of the testator.

In conclusion, we contend: First—That the will shows that the testator did not intend to die intestate as to any part of his estate.

Second—That where the limitation is over to a third person not related to the testator in blood, the court will so construe the will as to preserve the bounty of the testator to his own descendants.

Third—That unless the children take an estate, then the fee will pass in different directions as such children "may or may not reach the age of twenty-one years or marry."

Fourth—Where the limitation over is to a third person upon default of children of the first taker who shall die under twenty-one years of age, a devise to such child will be implied.

Fifth—Where from a reading of the whole will, it is apparent that the testator though he had given an estate to the children, a devise by implication will result in the children's favor.

In this case, we have a combination of circumstances appearing on the face of the will which, taken singly, will raise an implied devise. Taken together, they are not slight, but very strong circumstances, which the court will "lay hold of," in

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the language of the text-writers, to imply a devise in favor of the children of Julia Hunt who have arrived at the age of majority.

In addition to this, under the authorities in the state of Tennessee, a devise will be implied from a mere gift to one with a limitation over if he dies without children. If the limitation over is upon the death of the first taker "without heirs of the body or issue," the implied devise will be of a fee tail to the first taker in order that he may hold for the issue, as well as himself.

But where, as here, the limitation over is upon the death of the children without coming of age or marriage, it is submitted to the court that, while following the decisions of Tennessee some devise will be implied, the implication will be of a devise to the children "who shall reach the age of twenty-one years or marry," and not of a fee to the first taker. *Clopton v. Davis*, 4 L. R. C. P. 159; *Jordan v. Fortescue*, 10 Deav. 259; *Harper v. Tootal*, 11 House Lords Cases, 143; *Reed v. Snell*, 2 Atkins, 346; *Ferrand v. Jones*, 37 N. C. 236; *Re Blake*, 36 L. J. C. H. 747.

WHITFIELD, C. J., delivered the opinion of the court.

The bill of complaint in this cause was exhibited by the appellees herein against William M. Ball for the purpose of canceling, as a cloud upon their title, certain conveyances under which Ball claims to be the owner of lands described in the bill. The bill avers that the appellees are the grandchildren of one Wm. R. Hunt, who died the owner of the lands situated in Mississippi described in the bill, testate. That the said Wm. R. Hunt was a resident of the state of Tennessee, and his will was duly admitted to probate in the probate court of Shelby county, Tenn., and afterwards by the chancery court of Tunica county, Miss., some thirty-six years later. That the will was a holographic will. That the said testator left as his widow Sarah Hunt, and as his only heir at law Julia A. Phelan. That the

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appellees are the children of Julia A. Phelan, who died on the 13th day of February, 1906. That they are the only children of the said Julia A. Phelan, and the only lineal descendants of Wm. R. Hunt. That after the death of said Wm. R. Hunt the defendant Ball, or those under whom he claims, bought from the said Sarah Hunt and Julia A. Phelan the land described and claims the same adversely to complainants. The bill sets out *in hæc verba* the will of Wm. R. Hunt, under which the appellees claim that an ulterior limitation to them in fee after the death of their grandmother and mother was devised by implication. The defendant demurred to the bill. All the grounds of the demurrer present practically the same question, which is that complainants have no title or interest in the land under the will of Wm. R. Hunt. The demurrer was overruled and an appeal granted by the chancellor.

The whole case made by the bill, and the whole defense relied upon by the defendant, is presented by the demurrer. If that is sustained, complainants have no standing in the court. If it is overruled, the relief prayed by the bill follows as a matter of course, and nothing is left except an accounting.

The will of Wm. R. Hunt is as follows:

"In the name of God, Amen.

"I, William R. Hunt, being of sound mind, but feeble of body, do make and declare this my last will and testament hereby revoking all wills and testaments heretofore made.

"Item 1st: I will unto my wife, Sarah E. Hunt, for the time of her natural life, one-half of my property, both real and personal, to be hers during her natural life, then to go to my daughter, Julia Hunt.

"Item 2nd: I will and bequeath to my daughter, Julia Hunt, during the time of her natural life, the other half of my property, both real and personal, to be hers, free from the control of any future husband, and also free from the debts of any future husband, he is to have no title by curtesy, or any other title by reason of her death, or is to inherit it through the death

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of any child or children they may have or in any other manner whatever.

"Item 3rd: In case my daughter Julia should die without child, or in case the child or children should die before marrying or become of age, then the whole property given to my daughter Julia, all for her life, should go to Bettie Hunt Selden, and should she die before she marries or becomes of age, then one-half should be the property of Julia Moore Driver, and other one-half shall be divided between the children of my sisters, Marie L. Joiner and my sister, Leona E. Thompson, and the said Julia Moore Driver shall receive the property only for her natural life, free from the debts and contracts of any present or future husband and should at her death follow the same line of descent as the first mentioned half of the property.

"Item 4th: It is my will that the whole of my insurance on my life, amounting to $40,000, be put into the hands of my executor to pay my debts with, and he is directed so to use it, and if there be a surplus pay it into the general mass of my estate.

"Item 5th: I appoint Wm. Joiner my executor of this my last will and testament, and desire that no security be required of him.

"For witness whereof, I have hereunto set my hand and seal this 26th day of January, A. D. 1872.

"[Signed] WM. R. HUNT.

"Signed by us in the presence and by the direction of the testator, January 26th, 1872.

"[Signed] J. W. CLAPP.

"J. P. MEUX.

"There is to be paid all mother's money except $7,000, my share of her property, which is to be kept as mine.

"Proven at the June term, 1872, of the probate court, and ordered to be recorded.

"Recorded June 26th, 1872.

"JAMES RULBY, Clerk.

"J. H. CULLEN, D. C.

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Opinion of the court.

It will thus be seen that the exact question presented for decision upon the consideration of this will, especially the third clause of said will, *supra,* is this: Is there an implied limitation of a remainder in fee to the children of Julia Phelan after her death by said will? There is, of course, no express limitation, and these complainants, if they take at all by purchase, must take by virtue of such implied limitation. The one fundamental rule governing the construction of all wills is to ascertain what the intent of the testator was. This intent must be gathered, it is true, from the language used in the will, and by this is meant that such intention shall be gathered from the four corners of the instrument; that, is to say, from the whole will—the whole frame of the will; the whole scheme of the testator manifested by the will, taking into consideration and giving due weight to every word in the will; and, when once the actual intent of the testator at the time of the making of the will has been in this way ascertained, all minor, subordinate, and technical rules of construction must yield to this paramount intent thus ascertained. As well said in *Re Donges' Estate,* 103 Wis. 497, 79 N. W. 787, 74 Am. St. Rep. 885: "The comprehensive and all-dominating rule in construing wills is that the intention of the testator must be ascertained from the words thereof, in the light of all surrounding circumstances, and that intention be given effect. To accomplish this, multitudinous minor rules have been announced, more or less technical, which, however, serve not so much to restrict or constrain the judicial mind as simply to guide and to indicate probabilities in the absence of countervailing consideration. None of them are to be followed blindly if they lead to subversion of what was clearly the intention of the testator." It is also, of course, true that there must be no implication where that implication violates public policy or the settled rules of positive law. Extreme language is sometimes used by the courts as to how strong this implication must be. We think about the best statement on this point we have found is that of Judge Finch in the *Matter of Vowers,* 113 N. Y. 569, 21 N. E. 690, where

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he says: "The rule of construction which seems to have prevailed is that the inference need not be irresistable or such as to exclude any doubts possible to be raised, but must, nevertheless, be such as to leave no hesitation in the mind of the court, and must rest not upon mere conjecture. The intention must be clear so that no other reasonable inference can be made." Another question we make on this point because of the strong, common-sense grip it manifests upon this precise point, and that is what was said by STRONG, J., in *Still v. Spear*, 3 Grant's Cas. (Sup. Ct. Penn) 306, in a case not cited by counsel on either side, where he said: "The contruction given by the court below to the will of Charles Still, Sr., plainly defeats the general intention of the testator, and this without any necessity, for those intentions are not in conflict with any rule of law, or with any policy which the law does not tolerate. There are certain principles, it is admitted, which are intended to assist in ascertaining a testator's intention, and which are controlling when that intention is doubtful. They have been invoked to sustain this judgment. Among them are the maxims that the first taker of a legacy is presumed to be the chief object of a testator's bounty; that in doubtful cases legacies are to be held vested rather than contingent, absolute rather than defeasible; that the law favors such a construction as will render estates alienable; and that the primary intent is to be regarded rather than the secondary, if both cannot prevail. But these principles shed no light upon the will now before us. They are only applicable in cases of doubtful construction. They are never allowed to defeat a plain intent expressed. The purpose of the testator in this will is not obscure. That he did not intend Levi Still to have any share of his estate absolutely, that he did not intend to expose any part of it to seizure at the suit of Levi's creditors, and that he did intend a benefit to the children of Charles Still, on the happening of an anticipated contingency, would be very plain to every common mind. It is only when refinement commences that doubts arise."

Lord St. Leonards said very strongly in the profoundly con-

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sidered case of *Abbott v. Middleton,* 7 House of Lords Reports, side page 67: "I deny that you are not at liberty to look at the whole frame of the will in order to collect the general intention." And in the same case he says again, speaking of a construction in the case of *King v. Mellen:* "Now look at that; Lord Hale tells you that he could not be thought to prefer the youngest son before issue of the eldest;" and, in his most masterly exposition in that cae, he finally says: "I endeavor, and always have endeavored, to keep within these rules; but while I have endeavored to keep within those rules, I have also endeavored, where I could, to make them bend so as probably to meet the justice of the case."

Van Vleet, Vive Chancellor, put it very well in *Bishop v. McClelland's Ex'rs,* 44 N. J. Eq. 450, 16 Atl. 2, 3, 1 L. R. A. 551, where he said: "A bequest may undoubtedly arise from implication, but, to warrant the court in so declaring, there must be something more than conjecture to support its declaration. The implication must be a necessary one. The probability of an intention to make the gift must appear to be so strong that an intention contrary to that which is imputed to the testator cannot be supposed to have existed in his mind. A construction in favor of a gift by implication should never be adopted, except in cases where, after a careful and full consideration of the whole will, the mind of the judge is convinced that the testator intended to make the gift."

Let us now, in the light of these general principles, come to a particular consideration of the authorities relied upon on both sides, and, first, as to the authoritites which support the contention that there is here a remainder in fee to Julia's children by implication. In *Frogmorton v. Holliday,* 3 Burrows, 618, the testator, after giving, devising, and bequeathing unto his son David Hasselwood or his heirs forever certain property, devised to his other son, John Hasselwood, a certain piece of real estate, and added: "And if the said John Hasselwood shall happen to die his minority or before he comes to age, then I de-

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vise the said property unto my three daughters equally share and share alike." John was of the age of seven years at the time of the making of this will. John entered upon and was seised of the property until the time of his death, which happened in 1762. In the lifetime of John, David died intestate, leaving issue, to wit, David, his eldest son, who by deed of bargain and sale, conveyed the premises away to Stephen Bramstone. It was held that John did not take a mere estate for life, but the limitation over, only upon the contingency of his dying in his minority, shows that it was intended to give him an absolute estate in fee which he might dispose of if he came of age, and that unless he lived to be of age, when he might dispose of it, it was meant that it should go over to the daughters named in the will, and the conclusion was that John should have the estate unless he died in his minority, although there were no words about John's leaving issue.

In *Newland v. Shepherd,* 2 Peere Williams Reports, p. 193, Sir George Newland, whose daughter had married Shepherd and had three children, after making some other dispositions, "devised the residue of his real and personal estate to trustees to pay the produce and interest thereof for the maintenance and benefit of such of his grandchildren by his said daughter as should be living at the time of his decease until his said grandchildren should come to the age of twenty-one or be married; and he went no further nor made any other disposition of his estate." It was held that the grandchildren on arriving at age were entitled to the entire surplus, both of the real and personal estate.

In *Goodlittle v. Whitby,* 1 Burrows, 228, R. P., one devised his property to trustees in the following language: "In trust that they should lay out and bestow rents and profits for the maintenance, etc., of Thomas and John Haywood, sons of the testator's sister, Elizabeth Haywod, during their minorities; and when and as they should respectively attain their ages of twenty-one, then to the use and behoof of the said sons of his

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sister Haywood and their heirs equally." Thomas Haywood, the eldest of the testator's two nephews, died under the age of twenty-one without issue. Upon his death, his brother John being then under age, Thomas Whitby, the testator's heir at law, was let into the moiety of the deceased's nephew Thomas Heywood by the trustees. John, the surviving brother, brings the ejectment, and claimed the moiety of his deceased brother, as well as his own proper moiety, and the question was whether this moiety of Thomas, the deceased brother, belonged to John Haywood, either as heir to his brother or as surviving joint tenant, or whether it belonged to Thomas Whitby as his heir at law as an undevised estate; and Lord Mansfield held as follows: "Here, upon the reasoning of the thing, the infant is the object of the testator's bounty; and the testator does not mean to deprive him of it in any event. Now, suppose that this subject of the testator's bounty marries and dies before his age of twenty-one, having children. Could the testator intend in such an event to disinherit him? Certainly he could not." And let it be borne in mind that Julia Phelan, in this case, had children who came of age and married. Lord Mansfield said in the case *supra* that it was "so plain that it was a shame to cite cases upon it," but he did cite a devise, *Tomkins v. Tomkins,* where the devise was to his brother in trust for his eldest son B. until he should attain twenty-one years, and if he should die before twenty-one then a devise over, in which case the court held the age of twenty-one to be no limitation of B.'s interest, but only a limitation of the trust during his minority, and that B. took the whole by implication; and Lord Mansfield added, "So, here, the property is absolutely given, and the limitation is one of a trust."

In the case of *Crowder v. Clowes,* 2 Vesey, Ch. Reports, 449, the testator devised to his niece, Letitia Dawson, the sum of £1,000, to be paid to her immediately after his decease if she should happen to be then married; and then added: "But if my said niece should happen not to be married at the time of my

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decease, then I direct the interest for her said legacy of one thousand pounds to be paid her during her natural life, and to be calculated and be paid to the day of her death, or till she should marry, and if she should die unmarried, then the principal of the legacy was to lapse for the benefit of the person who might be entitled to his real estate." The legatee was unmarried at the time of the testator's death, but married soon afterwards. The bill was filed by her with her husband claiming this legacy, and the Master of the Rolls said: "There is no doubt that is there are not express words or necessary, and I will say unavoidable, implication from his having given it over if she dies unmarried, I cannot supply it. I cannot dive into his intentions, unless it is so expressed as to satisfy me he did mean it. The only question is whether upon reading this legacy and coupling it with a codicil giving two hundred pounds more to Letetia which may have effect upon the word 'addition,' it is not clear he meant to give her this when she married. Is it not the same as to say that is shall not lapse if she does marry? I am clearly of opinion it must be raised." And so Letitia took the legacy when she married, though she married after the testator's death.

In *Wainewright v. Wainewright,* 3 Vesey, 558, the devise was in these words, after giving to his four nephews and his niece each the sum of £300: "All the rest of my personal estate not hereinbefore disposed, I give unto my said nephew Robert Wainewright and John Seagrave upon trust that they should convert the property into money and lay it out toward the maintenance of his great nephew Thomas Wainewright now placed with my nephew Robert Seagrave, in Nottingham, until he shall attain his twenty-one years;" and added, "and in case my said great nephew shall happen to die before he attains his age twenty-one years, then my trustees shall pay the whole of said surplus of my personal estate, etc., unto and for the benefit of my said nephew, Thomas Wainewright." The testator died soon after the execution of this will. His great nephew, Thomas

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Wainewright, having attained the age of twenty-one, filed a bill praying that he might be declared entitled to the residue of the testator's personal estate, and the Master of the Rolls held that there was a necessary implication that, if the plaintiff Thomas did live and attain the age of twenty-one, he should have the residue of the personal estate, and significantly said: "Can any one doubt about it? His death under the age of twenty-one is to give it over to his father; but if he lives to attain that age, then the testator dies intestate—that is impossible. Is it not the necessary inference exactly like that in the case I have cited?"—to wit, the case of *Crowder v. Cloud, supra.*

In *Paylor v. Pegg,* 24 Beavan, 105, the will was construed as follows: "And if my son should happen to die before he attains his age of twenty-one years, then in that case I do hereby empower my wife to hold my whole estate during her natural life. If she continues my widow. Likewise, I do hereby empower my trustee, at the decease of my wife, to sell my estate, both real and personal, and out of the money I direct them to pay two legacies, etc., the residue to go amongst my nephews and nieces." The testator died in 1809. His son John attained twenty-one in 1823, and was let into possession. The testator's widow died in 1841, and the testator's son John died in 1856, having devised the estate to Mrs. Pegg. It is true this was not a case of implication, but I cite it to show that the court in holding that the son took the estates upon death of his father, by descent, worked that result out by finding it to be the purpose of the father not to disinherit his son, the court saying: "It is impossible to understand why the testator should have given the property to his son until he was twenty-one and then took it all away from him and gave it to his nephews."

A striking case is *Hoskins v. Hoskins,* 9 East, 305. There the devise was: "I likewise give and bequeath to my said son Richard the leasehold premises of Roskief, in St. Allen aforesaid; to hold the same unto my said son Richard until said son Thomas shall attain his age of twenty-one years and no longer.

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In case said Thomas Hoskins shall die in minority, then my will is, and I do hereby give and bequeath the said leasehold premises of Roskief unto John or Richard as soon as the said Richard Hoskins or either of them surviving or attain their age of twenty-one years as aforesaid, and I desire the said premises of Roskief may be quitted and delivered up as aforesaid by my said son Richard Hoskins accordingly." It was held that there was an implication from the words of the will that Thomas should take Roskief in fee when he came of age. Emphasis was laid, it is true, upon the last clause quoted, but the construction was upon the whole frame and scheme of the will.

In *Re Donges' Estate,* 103 Wis. 497, 79 N. W. 787, 74 Am. St. Rep. 885, the devise was: "I give and bequeath to my wife Clara Donges all the real estate of which I may die seised, to have and to hold the same until the youngest of my children if any be born to me, shall attain the age of twenty-one years. In case there are no children living at the time of my decease, my said wife shall be the sole owner of my real estate." The question was what was the intention of the testator if children were born to him and living at the time of his decease after the youngest attained twenty-one years of age. After an elaborate examination of authorities, in the course of a very able opinion, it was held that it was clearly the testator's intention to devise the property to the children on the majority of the youngest, they taking by implication.

Another instance of devise by implication may be profitably studied in the case of *Masterson v. Towshend,* 123 N. Y. 458, 25 N. E. 928, 10 L. R. A. 816. The case of *Clopton v. Davies,* 4 L. R. Com. Pl. Cas. 159, is very much in point here. There was a devise to trustees to apply the rents to the benefit of the testator's granddaughter, Mary Annie Clark, until she attained the age of twenty-one, and if she should die under that age, then over. It was held that there was a devise of the fee by implication to his granddaughter, Mary Annie Clark, the court saying that to deny the implication would involve the strange conse-

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quence "that, if the granddaughter die after twenty-one, the estate would go over to the two daughters named, whereas, if the granddaughter attained twenty-one, it would go over to the residuary legatees, who were other persons. The intention, the court said, was not to be imputed to the testator."

One of the strongest cases for the complainant is that of *Kinsella v. Caffrey.* There the testator gave £50 a year each to L. and T. for their lives, and on the death of either, leaving children, his annuity to go to such children, but if L. or T. should die leaving no children, at his death, his annuity was to go to the survivor for his life, and, if both should die leaving no children, or, leaving children, the said children should die under twenty-one, both annuities were to sink into residue. T. died unmarried, and afterward L. died, leaving children. It was held that L.'s chilren were entitled by implication to T.'s annuity, the court asking, "Why was the event of their attaining twenty-one introduced if they were intended to take nothing prior to their attaining twenty-one?" This case squarely decides that where the limitation over to the third person is not only upon the default of children, but upon the event that such child shall die under twenty-one years of age, this last circumstance is sufficient to raise an estate by implication. The decision did not go—that is to say, the devise was not implied—upon the ground that it increased an estate already given, but because the limitation over was upon the death of a child before coming of age. Mr. Jarmon propounds in his valuable work, Jarmon on Wills, vol. 1, p. 557, the inquiry, "Why was the event of their attaining twenty-one introduced if they were entitled to take nothing prior to their attaining twenty-one?" causing the same to be printed in italics, for the express purpose of showing that this thought was a controlling one.

In *Aspey v. Lewis,* 152 Ind. 494, 52 N. E. 758, an estate in remainder by implication was held to have been given to the daughter, Maria Louisa, under this provision: "And I direct

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further that the estate (that is to say, a widowhood estate in his wife Elizabeth) that is bequeathed to my wife shall be in full possession of my only daughter Maria Louisa at the death or marriage of my wife, provided she be living, and if she is not living at the death or marriage of my wife, then the estate to go to the use of my brothers or sisters or their heirs." The controlling thought was that no construction of a will should be accepted unless the purpose was manifest, if that purpose resulted in the disinheritance of a child, and the construction was had so as to vest this remainder in fee by implication in Maria Louisa as carrying out the intent of the testator, althought there was an express provision in the will that if Maria Louisa was not living at the death of the widow the estate should go over to the brothers and sisters.

A very important case in considering the construction of this will, not referred to by counsel on either side, is the case of *Bentley v. Kaufman,* 12 Phil. (Pa.). 435. The testatrix directed all her estate, real and personal, to be sold and the proceeds to be invested by her executors in the best securities, the interest to be paid to her son during his nautral life. If her son should die without issue, then the whole investment to be given to the Lincoln Institute. It was held first that the words "die without issue" meant a definite failure of issue, and that, consequently, the son did not take an absolute interest in the fund, but only life interest in the income; and, secondly, that there was a gift by implication of the corpus of the legacy to the son's issue if he should leave any at his death. THAYER, J., made the following exceedingly strong observations on this case: "The real question, therefore, which is now to be determined is, what interest did Leon Kaufman take under his mother's will? Did he take an absolute estate, or only a life estate? And, as regards the answer to this question, no difference is to be made between that portion of Mrs. Kaufman's estate which was of her own acquisition and that portion which she derived from her father by her survivorship of her sister Sarah and her

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brother Joseph, for over both portions alike she had an absolute right of control and disposition, and both alike passed under her will. Now, it must be quite plain to the common understanding that Mrs. Kaufman did not intend to give her son an absolute estate in her property, but only the interest of the proceeds, when invested, during his natural life. In the first place, she said so explicitly in her will. The gift to her son is a gift 'of the interest of my estate,' and it is 'to be paid to my son during his natural life, in half-yearly payments, and she gives him nothing more. In the second place, she directs that if her son, Leon Kaufman, should die without issue, that the whole of her estate should go to the Lincoln Institute. What is this but a gift of the interest to the son for life, with a remainder (if one may, for convenience, speak of a remainder with reference to personalty), by necessary implication, to his children, and, in default of children, a gift over to the objects of her charitable bounty? But, although this may be ever so plain to the common understanding, it is asserted by the plaintiff's counsel that the intention is defeated by the application of the rule that when there is a gift of personalty for life, followed by a gift over in default of issue, there being no immediate gift to the issue, the gift over is void, and the first taker takes absolutely—a proposition entirely correct in its terms where there is no intermediate gift to the issue, either expressly or by implication, and where the gift over is dependent upon an indefinite failure of issue. But it has no implication whatever in a case where the limitation over is on failure of children only, or on failure of issue within a given time, or where there is an intermediate gift by necessary implication to the issue of the first taker."

In the case of *Ranelagh v. Ranelagh,* 12 Beavan, 200, the devise construed there was this: After giving to his two daughters during their natural lives £4,000, and to his two sons £2,000 each, during their natural lives: "In case of the decease of any of the above parties without issue, their, his or her proportion to be divided equally amongst the surviving heirs." It

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was held that dying without issue meant living at the date of the death of the legatee—definite failure of issue. It was held further that the issue of the legatee were named in the codicil, only as a description of the contingency on which the legacy was to be given over, and that no express interest was given to the children. The Master of the Rolls went so far as to say that he thought it extremely probable that the testator did mean a benefit to the children, but *"si voluit non dixit,"* and he denied the implication. He referred expressly to the distinction that might exist between the case where the first devisee took for life only and where he took the fee, as to which later.

Another strong case against implication is the case of *Den, Lessee of Elizabeth Franklin v. Trout,* 15 East's Reports, decided in 1812 by Lord ELLENBOROUGH. Still another very striking case against implication is the case of *Dowling v. Dowling,* 1 Eq. E. L. R. 441. The case was first decided by Sir John STEWART, V. C., who held that there was an implied devise, but afterwards it was reversed. See 1 Chancery Appeal Cases, L. R., decided in 1866, *Dowling v. Dowling,* and the devise by implication was denied. In this case the testator, R. H. Dowling, after various devises to his daughter, and to his daughter's husband, and his two sons-in-law, finally added this devise: "I bequeath to each of my sons as follows (four in number), the remainder of my household furniture, and all things appertaining to my household effects, to be equally divided, that my freehold estates and all other property shall be disposed of as my executors think best, and be added to and invested with any other personal property, the interest thereof to be equally divided half yearly between my four sons above named, and at the decease of either without lawful issue, such share to revert to the remainder then living, their child or children." Lord Justice TURNER, construing this last provision, said: "The gift to the sons was an unlimited gift of the interest passing the capital. The expression is, 'the interest to be divided half yearly between my four sons, and at the decease of either without leav-

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ing issue, such share to revert to the remainder,' which seems to assume that the share of each was considered by the testator to have become vested in the original persons to whom he had given it. There is, therefore, in my opinion an absolute gift to the sons but this absolute gift is subject to this condition: that, upon the death of either of them without issue, the share is to revert to the remainder then living or their child or children. It appears to me, upon the construction of the whole will, that the children are not to take any interest as against their parents. If the parents are out of the way, then the children are to take in their place, but so long as there are parents the children are to take nothing, and the testator thought that in that case he had done enough for them, for the parents might provide for their own children. This case is exactly on all fours, in principle, with the case of *Halsey v. Gee,* 79 Miss. 193, 30 South. 604. That case went upon the ground that the two devisees there took the absolute interest, not a life estate, an absolute interest, determinable, it is true, upon the contingency named, but nevertheless an absolute interest as distinguished from a life estate.

In the case of *Scale v. Rawlins,* reported in the Law Reports, Appealed Cases for 1892, the provision was that the testator gave three freehold houses to his nephews, S. and W., upon trust to pay the rents and interest to his niece during her life, for her separate use, and after her death, she leaving no child, he gave one of the houses to S. and the two others to W. After making other bequests, he gave the residue of his whole estate to S. and W. equally. The niece died leaving children, and it was held that the niece took a life interest only, and no estate by implication was allowed to her children. Lord HALSBURY said: "The difficulty which we have here is not speculating upon what peradventure may, at some time or other, have been in the testator's mind, but I must find words which are absolute and express. I may be perfectly satisfied that he intended that this lady should have an estate of inheritance in this property. I may be satisfied that that was his intention otherwise than by

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the words of the will, but I should be compelled to come to the same conclusion as I do now, viz., that that intention is not sufficiently expressed. . . . It is said that he intended to make a gift to the children. I cannot say that he had not the intention, but all I can say is that he has not expressed it, and your lordships cannot put it in words simply because you may have some suspicion that in making his testamentary disposition that was the intention on his mind." This is, perhaps, as strong a statement as can be found against devise by implication, unless perhaps—and we close quotation on this topic with the language in the case—it is the language of Sir H. Cotten, referred to in 2 Jarmon on Wills, where Mr. Jarmon says: "Sir H. Cotten pointed out the fallacy of a proposition urged at the bar in this case, and which sometimes of late had been heard even from the bench, that, subject to the established rules, the duty of the court was to construe the will as a person of ordinary intelligence would do, and that no such person would doubt that in this case the testator intended the widow to have a life estate. 'Of course,' said the L. J., 'we are bound by the rules which have been established by the courts to enable us to say what the words used do mean. Subject to that, we are bound to construe the will as trained legal minds. And that differs from the mind of an ordinary person in this way, that even persons of ordinary intelligence not so trained are accustomed to jump at the conclusion as to what a person means by the words he used, by fancying he must have done what they, under similar circumstances, think they would have done. . . . That is conjecture only, and conjecture on an imperfect knowledge of the circumstances; because, although, if the facts before them and in evidence were all the facts, they may think that they would have taken a particular course, yet it does not follow that all the facts known to the testator are in their minds, or in evidence before them, or that the testator's mind was in any way constituted as regards the attention he paid to the rights and claims of the different parties dependent on him as their minds

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are constituted, or that he would have acted in the same way as they. Therefore, as lawyers, we must construe the will like any other document, with one difference only, namely, that technichal words are unnecessary in a will.' "

These cases have been selected as the clearest statements of the law for and against devises by implication. A multitude of other cases have been cited by learned counsel on both sides, every one of which has not only been read, but carefully studied. Out of all this mass of learning, the true purpose should be to derive some general principles supported by settled authorities for our guidance in the construction of this will. If any one thing can be evident, after the review of the authorities, it is what Sir William Jones said more than two hundred years ago, that no will has a brother." Every will must be determined upon considerations pertaining to its own peculiar facts and terms alone. One of the propositions most earnestly insisted on by the appellants is that, where there is a bequest to a person, and if he shall die without having children living at his death, then over, this does not raise an implied gift in the children, but that the parent takes an absolute interest defeasible on his dying without having had, or without leaving, a child, as the case may be. This is quoted from Jarmon on Wills (6th Am. Ed.), vol. 1, 555, 556. Mr. Jarmon states that the reason of this construction is that the rejection of the implication in such a case is not productive of any absurdity, for, say he, "It supposes the testator, by making the interest of the legatee indefeasible on his having or leaving a child, to intend that if there are children he shall have the means of providing for them," and this rule is thus stated in all the text-writers; but that is the case of the first taker taking the absolute interest, and not any less interest. It is like the case *supra Dowling v. Dowling,* and it is also like the case of *Boling v. Miller* (Sup. Ct. Ind.; decided Feb. 18, 1893), 133 Ind. 602, 33 N. E. 354, and the very important case of *Baker v. McLeod's Estate* (Sup. Ct. Wis.; decided May 5, 1891) 79 Wis. 534, 48 N. W. 657, the opinion being by the very

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learned Judge CASSODAY, in the course of which Judge CASSODAY gives approval to the following quotation from the opinion of Judge ANDREWS in *Vanderzee v. Slingerland,* 103 N. Y. 51, 8 N. E. 249, 57 Am. Rep. 701, which we also heartily indorse to this effect: "It may be safely assumed that, where a will is dictated under the influence of family relations, it would seldom happen that a testator would intentionally cut off the issue of a son or daughter from taking the share of the parent in his estate for the benefit of collateral objects." We think this announcement of Judge ANDREWS is the announcement of a great and correct legal principle, to which too much heed cannot be given; and in the case of *In re Application of N. Y., etc., v. Van Zandt,* 105 N. Y. 89, 11 N. E. 492, 59 Am. Rep. 478, the provision of the will was this: "I direct that in case my daughter Minnie should die without issue, that my real and personal property should be possessed and enjoyed by my husband and my sister during their natural lives, and after their death, the real and personal property to be divided equally between my four brothers (naming them), share and share alike; the devise over to my husband, sister and brothers to depend upon the contingency of my daughter Minnie dying without issue." The court held that Minnie Van Zandt took under her mother's will a base or conditional fee, defeasible on her dying without leaving issue living at the time of her death; that her issue, should she leave any, would take by inheritance from her, but that a conveyance by her in her lifetime would be effectual as against her children. We call especial attention to this case as being also identical with *Halsey v. Gee,* 79 Miss. 193, 30 South. 604. Minnie took an absolute interest, defeasible upon the contingency named, not a life estate. In the case of *Cassell v. Cooke,* 8 Serg. & Rawle (Pa.) 268, 11 Am. Dec. 610, the testator devised to his son, George Stewart, a plantation as soon as he arrived at the age of twenty-one, not saying what interest he gave, but giving generally, and then adding, "If my son, George Stewart be removed by death before he is

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of age, his part only shall fall to my two daughters." It was held that George took an absolute interest defeasible upon his dying under twenty-one, and this strong language is used in the opinion of the court: "The whole doctrine of the effect of the words, 'If he should die under twenty-one,' is fully stated" in *Bramstone's Lessee v. Holladay,* 1 W. B. L. 335, 3 Burr. 1618, it clearly appears that the giving over on a dying before twenty-one shows an intention that, if the party attain twenty-one, he shall have a fee-simple, and this case is approved in *Busby v. Busby,* 1 Dall. 226, 1 L. Ed. 111, as a leading one, on the general doctrine of a devise by necessary implication: "Let any man ask himself this question: 'What did the testator mean when he said if my son George be removed by death before he be of age his part to fall to my two daughters?' His answer most assuredly would be that he intended by these words that if he arrived at that age he should have the power of disposing of it as he pleased, and, if he died without disposition leaving heirs, it should descend to them; that the limitation over depended on one contingency—his death within age. This is not a construction by conjecture, but one arising from the words themselves on the most necessary implication." The last four cases are of very great importance as settling the point as stated, where the first taker takes an absolute interest; and it is upon the principle announced in these four, *supra,* that *Halsey v. Gee,* 79 Miss. 193, 30 South. 604, rests. The interest there given to the first takers was general and absolute, defeasible, however, upon the happening of the contingency named. There was not there any life estate, or any less estate than an absolute one, defeasible, however as stated. *Halsey v. Gee* is perfectly sound on that principle, but it is not a case proceeding at all upon the line of decision with the two Tennessee cases so much relied on by appellant of *Nott v. Fitzgibbon,* 107 Tenn. 54, 64 S. W. 26, and *Owen v. Hancock,* 1 Head (Tenn.), 563.

But in this will, the one thing that stands out clear and distinct and unmistakable—the mountain in the landscape of the

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will, so to speak—is the express and positive direction, thrice repeated in the will, that Julia shall not have anything beyond a life estate, either in the half first devised to her, or the half she was subsequently to take from her mother; that one paramount purpose dominates the whole structure of this will, and to that purpose all else must be made to bend, so that it is idle to cite authorities as to what would be the construction had Julia taken an absolute interest. It is perfectly clear that she cannot take under this will, either by descent or by purchase, any fee of any kind. It was the clear purpose of the testator to limit her, at all events, to a life estate. The very reasons urged with so much ingenuity and force by the learned counsel for appellant to show that the testator had an overshadowing fear of Julia's husband ever becoming possessed, in any manner whatever, of any interest whatever in the estate devised to Julia furnish, themselves, the strongest ground for holding that Julia should have only a life estate, should never take a fee either by descent or by purchase, and should never have the life estate that she had enlarged by construction into a fee upon the birth of issue. So to hold would be absolutely to nullify the paramount provision of the will limiting Julia strictly to a life estate. What, then, is the law where the first taker, like Julia, gets only a life estate? Mr. Jarmon says, in the passage above quoted, on page 556, in the first volume of his great work, as follows: "And even where the language of the will necessarily confines the interest of the parent to his life, the children will not generally be held to take by implication; it is extremely probable that the testator intended a benefit to them; but *si voluit non dixit.* But it seems that in such a case the court will lay hold of slight circumstances to raise a gift in the children, and thereby avoid imputing to the testator so extraordinary an intention as that the devisee or legatee over is to become entitled if the first taker have no child, but that property is not to go to the child, if there be one, or its parent. Thus, where a testator having by his will bequeathed one thousand pounds

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to his niece A. by a codicil, reciting that she had married indiscreetly, and that he intended to withdraw the legacy out of her power to dispose of it, and out of the power of her husband so to do, did therefore direct his executors to secure his said niece the interest of the said one thousand pounds independently of her husband, by placing out that sum in trust for his niece, she to enjoy the interest or dividends during her life, and at her decease, without child or children, the principal and interest to be divided among such of her sisters as should be then living. Sir T. Poumer, V. C., was of the opinion that by the combined effect of the will and codicil he was justified in saying that the children took the legacy by necessary implication." And this rule has been steadily followed in many cases of great consideration; as, for example, in the case of *Sturges v. Cargill,* 1 Sandf. Ch. (N. Y.) 318, where the court held that there the language of the will necessarily confined the interest of the parent to his life. The courts in construing wills, will lay hold of slight circumstances to raise a gift in the children to avoid imputing to the testator the extraordinary intention of giving the property to the devisee over, and leaving the issue of the tenant for life unprovided for. In that case Cargill, by his will, after providing for his wife, divided his real estate into five equal parts. He gave one of these five parts to his executors in trust for the use of the wife of his son Henry during her life, and on her death the estate was to descend to Henry's children. The other four portions were given for the use of four other children. Now, it happened that Jane, at the date of the will, the wife of Henry Sturges, the son, had a large family of children, and because the will clearly showed the intention to be to deal with all alike, and there was an absence of any reason for cutting off Jane and Henry's children, it was held that the trustees took in trust for Jane for life, with remaining to her children; the court working this intention out of nothing but the mere environment of the parties and the general frame and scheme of the will. This case does not seem to be referred to by either side in their briefs.

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Opinion of the court.

The case of *Kinsella v. Caffrey,* 11 Irish Chancery Reports, 154, is exceedingly strong for the devise by implication, as is the case of *In the Matter of Vowers,* 113 N. Y. 569, 21 N. E. 690, and *Aspy v. Lewis,* 152 Ind. 594, 52 N. E. 756. The case of *Langston v. Langston,* 2 Clark & Finnelly, 194, is also a case of the strongest sort for the devise by implication.

What, now, are the considerations or circumstances which the court in this case should look to as showing, since Julia's estate was limited strictly to life, a remainder in fee by implication in the children of Julia? Some of them are as follows: First and chiefly, that Julia's interest was limited strictly to her life. This we regard as controlling in the construction of this will. Second, there was an exclusion, by the terms of this will, of all the marital rights of any husband that Julia might have, and especially an exclusion of any right he might have to inherit through the death of any child of his and Julia's. It woud have been far more likely, on the doctrine of probabilities, that such husband might inherit from such child if Julia should be held to take a fee in any view, than if she should be limited strictly to a life estate, and the children should only take the fee absolutely after they became of age or married. The father would be much more likely to have died when this latter period came around than while Julia herself might live. Again, the fact that Hunt, by his will, provided that Bettie Hunt Selden, if Julia died without child, or if such child died before marriage or before coming of age, should take the limitation over; and he made the same sort of ulterior limitation as regards Julia Moore Driver, the other ulterior limitee. The carefulness and solicitude and anxiety manifested by Hunt to dispose of his estate, not only for life to Julia, but to provide three ulterior destinations in certain contingencies named, signalize his set purpose not to die intestate as to any part of his estate, and, consequently, his necessarily involved purpose that Julia should never take a fee of any sort of inheritance or purchase from him. And unless there was a limitation my implication to the children of Julia, then upon the com-

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ing of age or marrying of any such child, which would cut off the ulterior limitation to others, there would result necessarily an intestacy as to the remainder in fee, and Julia would, of course, take that by descent, and not as a purchaser under the will. This cannot possibly be the proper construction of this will; for in that case there would be nothing to prevent the husband from inheriting from Julia, which was most sedulously and stringently guarded against by this testator. It is said by the learned counsel for appellant that this will must have been drawn by a skilful lawyer, learned in the law of wills. We confess that a most careful study of this will has brought us to the exactly opposite conclusion. We think it is manifest that this testator thought when he wrote the will—it is a holographic will—that Julia's husband would have curtesy somehow or other in the estate she took. He could not have had any curtesy in a life estate, of course, and yet he certainly thought so, and attempted to provide against it. Nor could he have had any curtesy in a determinable fee.

The very essential nature of an estate by curtesy forbids any such view of the law. Again, it is manifest that it was the testator's thought that he could limit the right of the father of the children to take by inheritance from them. This is a thoroughly erroneous view, and yet he entertained it, as witness the provision that he should not inherit through the death of any child, etc. Again, it is impossible to read this will without seeing that it was the manifest purpose of the testator to dispose of his whole estate, and not die intestate as to any part thereof. He did not intend that Julia should take anything by inheritance from him arising out of any partial intestacy. It is to be remembered that the rule laid down by Judge ANDREWS in 113 N. Y. 569, 21 N. E. 690, *supra,* is strong to show that, where the limitation is over to a third person not related to the testator in blood, it is safely to be assumed that he did intend to preserve his bounty for his own blood, if that construction can reasonable be indulged. If the children of Julia were not intended to take a fee in remainder by implication, manifestly this es-

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tate went to strangers to the bood of Hunt, the testator. It must also be kept carefully in mind here that the limitation is not simply over to third persons on the default of children, but on that default, plus the other contingency, that such children should die under twenty-one years of age, or before they marry —two contingencies in fact. Less than this was held in *Kinsella v. Caffrey* to raise the estate by implication.

It is earnestly argued by learned counsel for appellant that under the decisions of the supreme court of Tennessee, to be noted later, there was a devise here by implication, but that that implied devise is not of the remainder in fee to the children, but of fee to Julia; that is to say, that, upon the birth of issue, Julia's life estate was, by implication, enlarged into a devise in fee. And it is urged, which is true, that the courts will go further in implying a devise of an added interest to one to whom some interest has already been devised than they will to imply a devise, or, as it is said, create a devise in one to whom nothing had been previously devised. This abstract legal proposition may be conceded, but the complete answer to this line of argument is that if the court is driven, in this case, to imply some devise, it should most assuredly imply a devise in harmony with the perfectly plain, paramount purpose of limiting Julia strictly to a life estate, which devise would necessarily then be a devise of the remainder to the children of Julia. Assuredly, in the face of the thrice-repeated purpose to limit Julia to a life estate, and in the face of the most anxious purpose to exclude the husband from any possible interest in his estate through the children or through Julia in any manner whatever, it would be a most extraordinary construction, and a most flagrant perversion of the purpose of the testator, to hold that there is an implied devise here to Julia of a fee upon the birth of issue. It must be kept in mind that this will does not stop with giving the estate to Julia for life, and, if she dies without issue, over to Bettie Hunt Selden, but it was essential that the children should die under age or not marry.

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Opinion of the court.

It is earnestly insisted by the learned counsel for appellant that the only mention of Julia's children in this will is by way of prevention of inheritance by Julia's husband of property, either through them or lack of them; and counsel stresses as the great controlling purpose of this will the idea that the husband was never under any circumstances, to take any interest in any way. It is undoubtedly true that this was a leading purpose of the will, but it is just as clear that the testator's mode of effecting this was to limit Julia's estate to life and leave the children to take the remainder in fee by implication. The one dominant thought in the will is the limiting of the estate Julia takes to her life strictly. If she should die without children, the husband could not then take, because the fee went over to ulterior limitees most carefully provided for. If Julia had children who arrived at age or married, which was the event which took place in this case, while no express gift is made to these children, it is incredible that the father should intend to strip them of any interest as soon as they should marry or come of age. This cannot be a sound construction. We think the learned counsel for appellant has too much stressed the anxiety of the testator to cut the husband out, in what they have to say about his curtesy in his wife's estate and about inheriting from his children. These are mere blunders as to what the law was on the part of this testator.

There is a principle of law, as correctly stated by learned counsel for appellant, that the courts will more readily sustain a devise by implication to children upon arriving at age or marriage, where some beneficial interest had been given them during minority, than where no interest of any kind has been given them. Authorities are cited to this principle, and it is a sound principle within proper limitations, but it must be carefully guarded in its application to the terms of each particular will considered. It is very likely to be overstressed in the case of a will where it is plain that the children are mentioned in merely stating a contingency, upon the happening of which the devise over will take effect. Of course, wherever this last sort of pro-

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vision clearly appears, there cannot possibly be any devise by implication; but where the devise by implication is to be maintained or not upon nothing but the naked test whether any interest is express and given to the children during minority, it is a test of exceedingly dangerous and delicate application, and it will be found on a careful examination of authorities that a devise by implication to children on arriving at age or marriage is maintained in many cases where there is nothing in the will to show any present interest devised to them, equitable or legal, during minority, such implication in such cases being worked out by the court as the plain result of the whole scheme or frame of the will of the testator.

We have most carefully and anxiously weighed the three expressions in the will from which learned counsel for appellant argue the implication must be derived, if it is derived at all, and, whilst the reasoning is exceedingllly ingenious and well supported as to the abstract principles announced, it is clear that, looking to the frame of this will, its manifest scheme and design and purpose as a whole, there is discoverable upon its face the purpose to benefit these children, and there does arise a necessary implication of a remainder in fee in these children. Finally, the learned counsel for appellant most earnestly insist that the intention of the testator must be ascertained from the decisions of the supreme court of Tennessee, the state of the testator's domicile, and the learned counsel for appellee apparently concede this contention in its entirety. The rules of construction and interpretation are very accurately set forth in volume 22 of Am. & Eng. Ency. of Law (2d ed), at page 1366 *et seq.* The land in this case is in the state of Mississippi. Nothing can be better settled than that the title to real estate is governed solely by the law of the place where the property is situated, but it is said correctly on page 1307, (b), as follows, touching the particular rule involved: "Where the inquiry, is directed solely to the ascertainment of the meaning and intention of the testator from the language employed by him in the will,

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the *lex domicilii* controls." In note 3 to this section it is said, referring to the principle that the title to real estate given by will is governed by the law of the place of the *situs*, that a different rule seems to obtain in Mississippi, since there it was held, in *Crusoe v. Butler*, 36 Miss. 173, that "the nature, obligation, and interpretation of the instrument, and the rights and powers arising under it," must be determined by the law of the domicile. This is a just criticism of that case, in so far as the words "rights and powers arising under the will are concerned," for the court evidently mixed the two rules of construction in that inaccurate language. In volume 30 of Am. & Eng. Ency. of Law, at page 602, it is said: "It is also the legal, not necessarily the actual, intention, which governs." This is a confusing and misleading statement, as the authorities cited show. The principal case referred to under this citation is the case of *Martindale v. Warner*, 15 Pa. 471. That case was just this: The testator made a will by which he devised the remainder of his estate to two brothers as residuary legatees, and they both died before he did, leaving children. At the time of the making of this will the law was that these residuary legacies lapsed, and did not go to the children of the residuary legatees. But the legislature passed an act, after the will was made on May 6, 1844, changing the rule so that the children would take. The testator lived long after this law was passed. This law on its face provided that it should apply only to wills made after its passage, and the court held, of course, that the law in force at the time of the making of the will governed. The court said, on page 480: "I do not put the case on the actual intention of the testator, but on his legal intention, which is the only safe rule. That the testator permitted his will to stand without alteration for several years, or that he may have known of the act of 1844, is nothing. It is a question of construction, depending on certain fixed principles, which ought not to be varied by fancied speculations as to the knowledge or ignorance of testators, some of whom may, or others may not, know of the statute and

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its legal construction." It is perfectly obvious that all that the court meant in this case, and that all that the court meant in the *Crusoe case,* and in the other three Mississippi cases cited, and in all cases announcing this particular principle about the difference between legal intent and actual intent, is, as stated in the passage above cited from volume 22 of Am. & Eng. Ency. of Law, that where the inquiry is solely to ascertain the intention of the testator, from the language employed by him in the will, what the courts of the state of his domicile have said those words will mean, will control. What the courts will concern themselves about, wherever a will is under review, is the ascertainment of the testator's actual intention; what he himself meant, not what the law presumes him to have meant. In strict reasoning, a testator can have but one intent—his own actual intent. To speak of a testator's legal intent is strictly a solecism; there is no such thing. So that, when it is said that a testator's legal intent is to be gathered from the decisions of the court of his domicile, nothing more is meant than that whatever his actual intent may have been, if he has used in his will certain technical terms to which the courts of his domicile have attached a crystallized and settled judicial meaning which has become a rule of property in that state, then such will, wherever it comes under construction in other states, will have the same meaning given to those technical words which the courts of his domicile gave them. That is absolutely what this phrase "legal intent" means, and this rule about the legal intent being governed by the courts of his domicile means. In truth, we should not speak of anything but the testator's actual intent, for that is all the testator ever had, so far as he is concerned. If that intent violates no law, it stands; if it violates the law, the will fails; unless the legislature has arbitrarily said, or the courts have by long construction said, notwithstanding his actual intent, a certain meaning shall be given to certain technical terms which he has used, which meaning shall save the will, although it may result in a different disposition from that

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which he intended. This principle finds no better illustration than in the now long-settled rule of construction, flowing from legislative enactment, that the words "children," "heirs," etc., which import at common law an indefinite failure of issue, shall not import an indefinite, but a definite, failure of issue, etc., making the words "issue," etc., mean issue, etc., living at the time of his death. In all such cases the actual intent was to create an estate tail, but the law, to save the purpose of the testator as far as possible, makes the failure of issue definite, and thus prevents an estate tail arising by construction. Now, this legislative declaration, followed by judicial construction, is what all these books mean by the legal intent, but it is plain that the phrase "legal intent" is a misuse of words, and that what is meant by the legal intent of the testator is simply the intent of the law; that is to say, the meaning the law imputes, whether the legislature or the courts, to the technical terms he has used in his will, not knowing their legal effect. In other words, where the testator has an actual intent that the law cannot effectuate, the law, in order to effectuate it as far as possible, gives to technical terms in his will a meaning that should save it so far as possible; but to call this construction of the law a legal intent of the testator is, as stated, purely and simply a solecism. There is no such thing as the testator's legal intent in this sense; so that the rule invoked by learned counsel for appellant means nothing more than that where, in a will, a testator has used certain technical terms, which terms have acquired, in the domicile of the testator, a fixed and unchangeable meaning, thus becoming a rule of property, these terms in such will, in whatever state the will is up for construction, shall be given, in the interpretation of the will, the meaning that would be given them by the courts of his domicile. The United States supreme court well said in *Smith v. Bell,* 6 Pet. 68, 8 L. Ed. 322: "The construction put upon words in one will has been supposed to furnish a rule for construing the same words in other wills, and thereby to furnish some settled and fixed rules

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of construction which ought to be respected. We cannot say this principle ought to be totally disregarded, but it should never be carried so far as to defeat the plain intent, if that intent may be carried into execution without violating the rules of law. It has been said truly that cases on wills may guide us as to general rules of construction; but unless a case cited be in every respect directly in point, and agree in every circumstance, it will have little or no weight with the court, who always look upon the intention of the testator as the Polar Star to direct them in the construction of wills."

Now, the two cases cited from Tennessee, *Owen v. Hancock,* 1 Head, 563, and *Nott v. Fitzgibbons,* 107 Tenn. 54, 64 S. W. 26, do not construe wills at all identical in their terms with the will under review here. What are those cases? *Owen v. Hancock* was this: A testator devised to his daughter, Mary Cooper, a negro named Celia during her lifetime, and, if she should die without any heirs born of her body, the said negro girl and her increase should return to his estate and be equally divided among the rest of his children. The first thing to be noted is that the words "heirs born of her body" are strictly words of entail, which would, under the old construction, create an estate tail; whereas, the words "children" in this will plainly mean the direct descendants; that is to say, the children only of Julia, and import a definite failure of issue. Second, in that case there was no ulterior limitation over to strangers to the blood of the testator; here, there is. Again, the court in that case expressly held that there was no difference as to raising the implication between the case where the first taker took an absolute interest, and where he took only a life estate. We have shown that this is not sound. The court reached the curious result in that case of first denying that there was any devise by implication of the remainder to the children of Mary Cooper, and yet in the face of a positive provision that her interest was limited to her life did raise a devise by implication of the fee to Mary Cooper, in the very face of the express declaration that she was to take

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only a life estate. However correct the result reached in that case, it seems to us it would have been far sounder, since an implication was to be raised, that there should have been an implication in favor of the children. In the case of *Nott v. Fitzgibbons,* while following the case of *Owen v. Hancock,* in another case where the estate was directly given to James Fitzgibbons for his life only, holding that this life estate in the son was enlarged by implication into a fee in the son, the court also proceeded to rest its judgment upon another line, which was this: It quoted from *Nachell v. Welding,* 8 Sim. 4, a devise to a son for life, and if the son should die without issue, then over, and approved an announcement from that case to this effect: "That whether an estate be given in fee, or for life, or generally without any particular limit as to duration, if it be followed by a devise over, in case of the devisee dying without issue, the devisee would take an estate tail;" and the court actually held, as we understand it, that because the devise to James Fitzgibbons provided for a devise over, in case he should die without issue, that, therefore, that was the devise of an estate tail, and so it was converted under their statute into an estate in fee in the first taker, James, who might, therefore, lawfully alien the property, and this, too, although there was at the time a statute in the state of Tennessee like our statute, construed in *Banking Co. v. Field,* 84 Miss. 646, 37 South. 139, providing that the words "without issue" in such connection would mean without issue living at the time of his death, which legislative construction, of course, prevented the arising of an estate tail under the old rule. It is obvious that this decision, resting upon the old construction and ignoring the statute, can have no influence upon this will, where the limitation over is upon the death of the life tenant, "without children, or if the children die unmarried and before the age of twenty-one," which expressions clearly import a definite failure of issue. They are words of purchase, and not of descent. They are not used interchangeably with the word "issue," as was the case in *Jordan v. Roach,*

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32 Miss. 481. It is obvious that in both *Owen v. Hancock,* and *Nott v. Fitzgibbons,* the Tennessee court held there was no intestacy, and did raise a devise by implication by enlarging the life estate into a fee. In this case it is clear that there is no intestacy from the whole frame of the will, but the implication from all the language in this will is as clear as can be of a remainder in fee by implication to the children. To hold here on the terms of this will that the life estate of Julia was enlarged into a fee is to fly in the face of the positive declaration, thrice iterated by the testator, that Julia was to have only the life estate, and thus to make for the testator a will, instead of construing one that he did make.

One other observation is due to be made about the case of *Nott v. Fitzgibbons, supra,* which is that that case was not decided until years and years after the death of this testator, and could not possibly have been in his mind at the time of the making of his will; and with respect to *Owen v. Hancock, supra,* there are one or two very important things to be further said: First, the case of *Owen v. Hancock* cites 2 Powell on Devises, 602, 20 Law Library, 321. The whole context of this citation has reference to the subject of estate for life where enlarged into an estate by implication. The author says: "It has long been settled that a devise to a person with a limitation over, if he die without issue, confers an estate tail. But, according to some early cases, an express estate for life cannot be so enlarged into an estate by implication, on the ground that implication can only be admitted in the absence of, but never in contradiction to, an express limitation." Again the author says, to which we call special attention: "It is to be observed that where the terms of a devise over refer to issue living at the death, it has no effect in enlarging a prior estate for life to an estate tail. The only question in such case would be whether they would raise an estate by implication in the issue living at the death." Now, this is the emphatic declaration of Powell in his work on Devises, in the very sections quoted by the supreme court of

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Tennessee in the case of *Owen v. Hancock.* It must be perfectly obvious, therefore, that the supreme court of Tennessee could not have meant to hold that where in a will the failure of issue is definite, and where the first taker is thrice limited to a life estate, such life estate in the first taker is by implication enlarged into a fee. The supreme court of Tennessee never has yet held that, and we do not think ever would. Indeed, in this very case of *Owen v. Hancock,* the supreme court says, 1 Head (Tenn.), 566: "A devise over after the death of the wife, or the arrival at age of a child, without expressly giving them any estate, would confer, by necessary implication, an estate for life or during minority." It seems clear, therefore, that the Tennessee authorities never have held what learned counsel for appellant claim, where the will made the failure of issue definite. For that reason, and two other reasons, they do not bind us: First, because the terms of the wills construed there are not identical or substantially like the terms of the will here, taking all its terms into view as we must; second, because the only effect of the rule in construing a will made by one domiciled in Tennessee that we are bound as to the intent of the testator by what the courts of his domicile say, is that we are so bound, not as to his actual intent, but as to what the technical terms he may have used in his will mean, where that meaning has been crystallized into a rule of property; whereas, here in this will, taking as a whole, there is no room for the play of this doctrine of construction of the will from the meaning of technical terms. The actual intent of the testator here is plain that Julia shall take an estate for life only. There is here a manifest definite failure of issue, and there are other provisions of the will, to wit, the ulterior limitations over to strangers to the blood of the testator, and the provision seeking to cut out the husband, which are decisive against the view which is urged by the counsel for appellant.

On the whole case, it is clear from the entire frame of this will, looking at all its parts and giving every word its due force, that this testator intended these children of Julia to take a re-

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mainder in fee. The implication is necessary from the whole scheme of the will; no other rational purpose can be assigned to the testator; and this opinion is closed with the exceedingly striking and forcible and apt language of Lord Brougham in *Langston v. Langston,* 2 Clark & Finnelly, 194. In that case the scrivener had, by accident, omitted a line in the will providing an estate for the first son. It was conceded that no estate whatever was given by the terms of the will, and that the court could not reinstate the omitted clause. Lord Brougham, in delivering his opinion giving the eldest son an estate by implication from the construction of the whole will, among other things said: "The third of the reasons is one which, I cannot help feeling to be exceedingly powerful, and which, upon all the views I can take of this subject, presses forcibly upon my mind. The existence of a son is to defeat no less than eight terms raised most carefully, artifically, and anxiously by the person who penned this instrument; and yet that son, whose existence is to produce such an effect, to create such destruction, to deal about such havoc upon the whole of this will, according to the construction set up by the King's Bench and by the appellant, not to benefit it in the slightest degree. My lords, it is monstrous to suppose that any rational person could really intend to make so much depend upon the event of a person coming into existence, which person, nevertheless, was to be of no force, of no effect, of no value in his eyes, except to be used as an instrument of destruction; that he was only to be considered as the means of taking away the benefit of other parts of this instrument, yet was himself to benefit nothing by that destruction."

This case has been argued with the most consummate ability by learned counsel on both sides. We acknowledge ourselves greatly indebted to them. The result is that, since the action of the court below in overruling the demurrer is in accord with the views herein expressed, the decree of the court below is hereby affirmed, and the cause remanded for an accounting.

Affirmed.

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WINSTON D. MILLER v. WINSTON COUNTY WAREHOUSE COMPANY.

[47 South. 501.]

OFFICIAL COTTON WEIGHER. *Winston County. Laws* 1906, *ch.* 227, *p.* 269. *Injunction.*

Under Laws 1906, ch. 227, p. 269, creating the office of cotton weigher for Winston county, a person elected to the office cannot restrain a warehouseman from having cotton received in the course of his business weighed by a private person, nor can he recover damages from the warehouseman for urging others not to have cotton weighed by him.

FROM the chancery court of Winston county.

HON. JAMES F. MCCOOL, Chancellor.

Miller, appellant, was complainant in the court below, and the Winston County Warehouse Company, the appellee, a corporation, was defendant there. From a decree in favor of defendant the complainant appealed to the supreme court.

The appellant's bill alleged that he was the regularly elected and duly qualified cotton weigher of Winston county; and that the defendant, a corporation engaged in the business of acquiring and storing cotton, constantly weighed cotton of its different customers and charged a certain sum for so doing, to the great prejudice of the complainant whose compensation being dependent upon the number of bales weighed by him, was greatly affected and reduced, since, on the defendant's weighing such cotton, the complainant did not get the opportunity to weigh it at the statutory charge. The prayer of the bill was that the defendant should be enjoined from weighing the cotton of its customers and charging a fee or compensation for doing so. The defendant demurred to the bill, and its demurrer was sustained.

Rodgers & Brantley, for appellant.

The office of county cotton weigher, under Laws 1906, ch. 227, is required to be filled through an election like other public

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Brief for appellee.

offices. The elected county cotton weigher must enter into proper bond and take the oath prescribed by law, and he is empowered under section 2 of the statute to appoint all deputies necessary to weigh the cotton in the county. Certainly an office created by statute and whose duties and compensation are fixed by the mandatory terms of the statute should not be robbed of its emoluments either directly or indirectly. *State v. Carr,* 28 Am. St. Rep. 163; *Bates v. St. Louis,* 77 Am. St. Rep. 702; *Shelby v. Alcorn,* 36 Miss. 273.

The exclusive right of the cotton weigher of the county to charge a fee of ten cents per bale for weighing all of the cotton sold in the county is fixed by law, and there is nothing in the third section of the Act of 1906 in question which can affect this.

Of course, any individual has the legal right to withhold his cotton from the county weigher and have some other person than the county cotton weigher weigh it. But if any one else than this officer charges for weighing the cotton in the county, the officer is still entitled to his commission. Under the statute, only the county cotton weigher can legally charge for weighing cotton sold in and shipped from villages and towns of the county. This is not unconstitutional. *Attorney-General v. Joachim,* 41 Am. St. Rep. 608, 1 Pomeroy, Eq. Jur. § 245; *Walker v. Hall,* 66 Miss. 390, 6 South. 318.

The case of *Planters' Compress Ass'n. v. Hanes,* 52 Miss. 469, cited by learned counsel for appellee is not applicable here. The bill in that case prayed for three distinct measures of relief: an injunction, a discovery and an accounting. Appellant in the case at bar prays for only two measures of relief: an injunction and for a stated account. He asks for no discovery.

Jones & Jones, for appellee.

Appellee, in carrying on its business, exercises the right to store cotton for it customers, and as an incident thereto it weighs such cotton. In so doing appellee in no way interferes with

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the legal rights of appellant. Appellant may weigh all cotton brought before him, but appellee also has the right, both at common law and under the express language of the statute law in question, to weigh the cotton of such persons as may voluntarily desire it done.

Appellant does not contend, it will be noted, that appellee has ever in any way interfered with his official duties other than by such acts as appellee exercises in its own business. Furthermore under its charter, granted by the state of Mississippi, appellee is given the right to weigh cotton.

Appellee is exercising its legal privileges of a warehouseman, and neither has bought nor sold any cotton, but is in the business solely of weighing and storing cotton for its customers. It will be noted that the latter part of section 3 of the laws of 1906, ch. 227, distinctly states that "nothing herein contained shall be so construed as to prevent any one from withholding his cotton from said cotton weigher, and said cotton weigher shall not be entitled to fees on cotton not weighed by him."

Appellant's claim sounds wholly in damages, and does not arise *ex contractu,* and his remedy, if he has any, is at law and not in equity. *Planters' Compress Ass'n. v. Hanes,* 52 Miss. 469.

FLETCHER, J., delivered the opinion of the court.

The appellant, though the regularly elected and duly qualfied cotton weigher of Winston county, is precluded from maintaining his suit by the provisions of the final sentence of section 3, ch. 227, p. 269, of the Laws of 1906; the act creating the office. The language of the statute is: "Nothing herein contained shall be construed as to prevent any one from withholding his cotton from said cotton weigher and said cotton weigher shall not be entitled to fees on cotton not weighed by him." It is perfectly manifest that, under this statute, appellant has no right to restrain the warehouse company from having its cotton weighed by a private weigher, and equally clear that no action will lie for commissions on cotton not weighed by appellant.

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Brief for appellant.

It is contended, however, that no one but the elected cotton weigher has the right to charge for weighing cotton. Even if this be true, appellant cannot complain, since this is a matter between the private weigher and his customers. Nor can the suit be maintained on the ground that appellant has sustained damage by reason of the action of appellee in urging the public to withhold its patronage from that officer. Such a grievance, if one exists, cannot be redressed, upon the case here, in a court of equity; all other grounds of jurisdiction having failed. *Planter' Compress Ass'n. v. Hanes,* 52 Miss. 469.

Affirmed.

MOBILE, JACKSON & KANSAS CITY RAILROAD COMPANY v. ROBBINS COTTON COMPANY.

94 351
95 610

[48 South. 231.]

RAILROADS. *Common carrier. Loss of freight. Bales of cotton. Market value. Evidence.*

That the owner paid a certain price for cotton is not alone, as a matter of law, sufficient evidence of its market value to justify a recovery of that price in an action against a common carrier for its loss.

FROM the circuit court of Union county.

HON. WILLIAM A. ROANE, Judge.

The Robbins Cotton Company, appellee, was plaintiff in the court below; the railroad company, appellant, was defendant there. From a judgment in plaintiff's favor the defendant company appealed to the supreme court.

The opinion of the court states the facts.

Flowers & Whitfield, and *George W. May,* for appellant.

The court erroneously instructed the jury, in favor of plaintiff, that if they should find from the evidence that plaintiff

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had delivered to the railroad company the seventeen bales of cotton and that this cotton was not delivered to plaintiff or to the compress company for plaintiff and that plaintiff never did receive the cotton or any cotton in its place, then "the jury must find for the plaintiff and assess the damage at the price paid by them for said cotton and for the freight paid the railroad company thereon, and six per cent. interest per annum on said amount from the date of said failure to so deliver said cotton."

Remembering that the record fails to show the date or dates of the purchase or purchases of the cotton in controversy and that the cotton was delivered at different times between October 24, 1906, and March 6, 1907, a period of nearly five months, and at different stations along the appellant's line of railroad, the instruction cannot be upheld unless it affirmatively appeared that the market value of the cotton in controversy during the entire period from October, 1906, to March, 1907, was uniform and that such market value represented the exact price paid by appellee for the cotton alleged to have been lost by appellant. The record nowhere shows that all of the cotton was purchased at one and the same time, and it nowhere shows that the reasonable market value at the time of the alleged failure to make delivery in accordance with appellant's undertaking was equal to the amount paid by appellee, which the instruction makes the basis of the calculation in determining the amount of appellant's liability because of the alleged breach of carriage and delivery.

The very contract upon which this suit is brought expressly provides, in its third paragraph, that "The amount of any loss or damage for which any carrier may become liable shall be computed at the value of the property at the place and time of shipment under this bill of lading, unless a lower value has been agreed upon or is determined by the classification upon which the rate is based, in either of which events such lower value shall be the maximum price to govern such computations. Claims for loss or damage must be made in writing to the agent at the place

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Brief for appellee.

of delivery promptly after arrival of the property, and if delayed for more than thirty days after the delivery of the property, or after due time from the delivery thereof, no carrier hereunder shall be liable in any event." The instruction above absolutely ignores the provisions of the contract, and lays down a new rule which is unsupported by any authority, so far as we can find.

If, instead of the market value, the railroad company or common carrier is compelled to pay the purchase price of any article lost, and a consignor has paid an excessive or foolishly extravagant price for a commodity which the carrier, through mere negligence, loses and fails to deliver, it will be readily perceived that a very great injustice would be worked upon the railroad company.

C. Lee Crum, for appellee.

The first instruction for plaintiff is criticized by learned counsel for appellant on the ground that it authorizes the jury, in case of a finding in plaintiff's favor, to assess the damages at the price paid for the cotton in the open market. The undisputed proof in the case is to the effect that plaintiff was in the business of buying and selling cotton upon the market, that it purchased upon the market at the market prices the seventeen bales of cotton in question. Appellee's representative said on his cross-examination, "We bought on the average of the season's prices and paid the reclamations on the basis of the selling prices." This is certainly presumptive evidence that the cotton was worth what plaintiff gave for it. It would be unreasonable and contrary to experience for the appellee to give more than the cotton was worth on the market. This proof is not conclusive that what appellee paid was the market price to the extent that appellant could not have rebutted this presumption with evidence if such had been in its possession. But appellant did not rebut it in any way, and there was no other proof of value and the court below properly instructed the jury that this presumption was sufficient to control them.

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It is true that the price of cotton could have fluctuated between the dates of purchase and the date of shipment, and if appellant had shown such fluctuations the jury would have been bound by the prices at dates of receipt of the several bales; but in the absence of proof, when appellee's witnesses were not even cross-examined on the subject, no presumption of fluctuation can arise, and it must be held that there was none.

WHITFIELD, C. J., delivered the opinion of the court.

The appellee sued the appellant to recover the value of seventeen bales of cotton which it is alleged the appellant had failed to deliver to it according to its contract, manifested by bills of lading set out in the record. The testimony, we think, establishes sufficiently the failure to deliver the cotton sued for. The plaintiff attached to its declaration an exhibit, which is a bill of particulars, showing the various parties from whom it purchased the seventeen bales of cotton, the numbers of the bales of cotton, the places of shipment of the cotton along the line of the appellant's railroad, the weights of the cotton, and the prices paid by the appellee for the cotton per pound, running all the way from seven and one-half cents to ten and one-fourth cents per pound, and the value of each bale of cotton, making in the aggregate the amount paid by appellee for the seventeen bales to be $798.66. Not a particle of proof was introduced on either side to show what the market value of the cotton was at the time of the purchase and shipment. Not a witness was asked a question in relation to this market value of the cotton.

The plaintiff, whether inadvertently or not, wholly omitted to make this proof, and relies here upon the proposition that, since there is no other evidence in the record than the prices paid by the appellee, that is sufficient evidence of such market value, and the plaintiff obtained from the court the following instruction: "The court instructs the jury, for the plaintiff, that if they believe from the evidence that the plaintiff had de-

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livered to the defendant railroad company, at the different stations named, the seventeen bales of cotton alleged to have been delivered for shipment, and that said cotton was not delivered to it, or to the compress company for it, and it did not receive said cotton from the railroad company, nor any other cotton in lieu thereof, the jury must find for the plaintiff, and assess the damage at the price paid by them for said cotton, and for the freight paid the railroad company thereon, and six per cent. interest per annum on said amount from the date of said failure to so deliver said cotton."

We cannot concur in the argument of appellee in support of this instruction. It is very easy to imagine a case, which might very readily occur, in which the purchaser of cotton might actually pay two or three times the market value of cotton in order to meet some contract of delivery of cotton, upon the meeting of which contract his credit and business entirely depended. Again, a purchaser might pay, being a bad judge of cotton, very much more for cotton than its market value. Manifestly, all that he could recover of the carrier for the failure to deliver would be, not what he might pay, but what the market value of the cotton was.

It follows that this first instruction is fatally erroneous, and for that reason the judgment must be reversed, and the cause remanded. *Reversed.*

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LYCURGUS M. QUIN v. PIKE COUNTY.

[48 South. 235.]

HIGHWAYS. *Improvement and maintenance. Contracts. Laws* 1900, *ch.* 119, *p.* 153. *Bond of contractor.*

Under Laws 1900, ch. 119, p. 153, providing for improving and maintaining the highways by contracts to be let by the board of supervisors, the contractors to execute bonds in a penalty equal to the amount of their respective bids, a contract otherwise proper is not fatally defective because it embraced all of the highways in two supervisors' districts of the county, nor because the penalty of the contractor's bond was by inadvertance a trifle less than his bid.

FROM the circuit court of Pike county.

HON. MOYSE H. WILKINSON, Judge

Quin, appellant, was plaintiff in the court below; Pike county, appellee, was defendant there. From a judgment sustaining the defendant's demurrer to the declaration and dismissing the suit plaintiff appealed to the supreme court.

The opinion of the court fully states the facts.

Price & Whitfield, for appellant.

Appellant's contract with the county was not invalid. The subject matter was one with reference to which the county could legally make a contract. The declaration distinctly shows that the road law, Laws 1900, ch. 119, was adopted and put into force in Pike county by order of the board of supervisors of the county in May, 1902; and that the county roads were divided into divisions, to wit, first-class and second-class roads, and also into links, by the board of supervisors in December, 1902. It is distinctly set forth in the declaration that the board, in December, 1902, prepared and placed on file with the clerk of the board detailed plans and specifications for the working of the public roads of the county, for the use and inspection of prospective

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bidders. And, further, the declaration avers that proper advertisement was made for bids and that appellant's bid was made in due form and accepted, being accompanied by requisite bond. The work done by appellant was passed upon by the board and accepted, from time to time, as it progressed. And partial payments were made at different times to the appellant.

The contention of the county is that the board of supervisors contracted with appellant to work the county public roads in the second and third supervisors' districts, after the board had adopted Laws 1900, ch. 119, thereby making the chapter the road law of the county; and that the board did not let out each separate link of every public road in the county or each separate road in the county under a separate and distinct contract. Our answer to this is that it was within the province of the board of supervisors, acting for the best interests of the county, to accept a bid for the working of one link or bid for the working of two or more links or two or more roads in one or more of the districts of the county. *Madison Co. v. Stewart,* 74 Miss. 160, 20 South. 857.

It is impossible legally to pass upon and construe appellant's contract with the county without taking carefully into consideration all of the orders passed by the board in open session including the board's adoption of Laws 1900, ch. 119, as the county's public road law, and all of the orders leading up to the consummation of the contract here involved, especially the partition of all of the public roads in the five supervisors' districts, and further the subdivision of every public road in the first and second supervisors' districts into first and second-class roads as provided by the act above mentioned, and also the subdivision of the public roads into links. These subdivisions of the roads into links are nowhere required by Laws of 1900, ch. 119, even if they were required by Code 1892, § 3929, before the county adopted chapter 119 aforesaid as its road law.

An all sufficient answer to appellee's contentions in this case is that any just and fair construction of the contract with ap-

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Brief for appellee.

pellant must be that the roads in question were contracted to be worked by divisions or links, and that the technical law, Code 1892, § 3929, was fully complied with in the execution of the contract.

The case of *State v. Vice,* 71 Miss. 912, 15 South. 129, relied upon by appellee, is a criminal case and entirely inapplicable here. At the time that case was decided Laws 1900, ch. 119, had not been enacted. The provisions of Code 1892, § 3929, that every road or subdivision should be let out under a separate contract, are not contained in chapter 119 of Laws 1900. Nor is there anything in Laws 1900, ch. 119, requiring a contract to be made for each road or subdivision thereof let out.

The fifth section or paragraph of chapter 119 of Laws 1900 is the only part of the statute dealing with the letting out of the contract or contracts for working the public roads of the county. Its language is: "Contract or contracts for working and keeping in condition in its entirety all of the public roads or any section thereof." Certainly the word, "section," is equivalent in meaning to "group" or "district" or some such collective word.

The fact that the appellant's bond in favor of the county was for a sum less than the amount of his bid is not such a substantial defect as will, in the absence of other defects, invalidate the contract.

J. B. Sternberger and *E. J. Simmons,* for appellee.

Laws 1900, ch. 119, was the sole repository of the power which the legislature conferred upon the different county boards of supervisors for the working of the public roads and highways. When Pike county chose to come under the provisions of this legislative act, it became irrevocably committed to the directions contained therein, and was without authority to read into that act a grant of power at variance with the plain language employed therein.

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Brief for appellee.

As was held in *State v. Edwards,* 81 Miss. 399, 33 South. 172, before the provisions of the act became legally effectual and practically operative, it was necessary that its essential provisions should be complied with by the board of supervisors. As we construe the act, it was necessary before the provisions of the act could be carried out, that the board of supervisors should meet and classify the public roads of the county as roads of the first-class and roads of the second-class, and should divide the roads, thus classified, each into convenient links, and should then inspect each link on each road as subdivided, with a view of preparing detailed plans and specifications for the working of such link or road, by a contract, which plans and specifications must be filed for record with the clerk of the board for inspection by prospective bidders, prior to the letting of contracts. An examination of the fifth section or paragraph of the act in question, construed with reference to the language of the first and fourth sections, will render it perfectly clear that the roads of the county, classified and subdivided into links should have been let as an entirety or by links; that is to say, it was competent for the board of supervisors to let out all of the roads of the county as thus classified and subdivided, as an entirety by one contract, or to let out one or more links or sections of any road by a separate contract. The word, "section," as used in the act, is used interchangeably with the word "link." The phrase, "any section thereof," as used in the act, means any link or section of a public road as classified and subdivided, and not a political subdivision of the county.

As a condition precedent to the making of valid contract by the board of supervisors in behalf of the county, for the working of the county public roads, not only should the act have been adopted and applied to the county by a proper order entered upon the board's minutes, but the classification of the roads should have been into first and second-class roads, and each of these divided into convenient links. And, to be legal, the contract should have been not only to work the roads of the county

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as an entirety, or for the working of one or more links under each separate contract, but that the working of the road or any link thereof should have been given out on competitive bidding, and bond should have been required with sufficient sureties and in such sum as might be fixed by the board and in no event to be less than the contract price, which was $24,272.50. Yet the appellant's declaration shows that the county roads were let to appellant, not as an entirety nor by links or sections of a road, but instead a lump contract was entered into with appellant for him to work all of the roads in the second and third supervisors' district. Under the strict requirements of Code 1892, § 344, prescribing that all contracts made in violation of law shall be invalid, the contract with appellant must be held to be a legal nullity. *State v. Edwards,* 81 Miss. 399, 33 South. 172; *Elmore v. State,* 81 Miss. 422, 33 South. 225; *State v. Vice,* 71 Miss. 912. The jurisdiction conferred by statute on boards of supervisors is special and limited, and must be exercised strictly according to the terms of the statute law. *Ballard v. Davis,* 2 Geo. (Miss.) 525; *Jefferson County, v. Grafton,* 74 Miss. 435, 21 South. 247; *Bridges v. Clay Co.,* 58 Miss. 817; *Dixon v. Greene Co.,* 76 Miss. 794, 25 South. 665; *Benton Co. v. Patrick,* 54 Miss. 240.

The contention of appellant that the legislature could not have meant that each link or division of every road in the county should be under separate bond and contract, and let out perhaps to different individuals, and that the legislature should not be held responsible for such a scheme, must fall to the ground in view of the fact that the general scheme for working the roads by contract, as provided by ch. 119 of the act in question, stipulates that all monies from the collection of a commutation tax must be expended in that particular district, village or town from which the same was collected; the only monies to be used in all parts of the county promiscuously being the *ad valorum* tax of the county. It will be seen that some districts and sections of the county would perhaps have a larger fund available

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for road purposes than others, and consequently should have better roads than others. Again, certain links or sections of a road might require a greater expenditure of labor and money than certain other links or sections of the same road. It will be readily apparent, therefore, that the only equitable and just way of working the public roads, giving to each road the labor and attention which it should have in view of the funds appropriated for its construction and maintenance, would be to let each road or section of a road be figured upon and let out separately.

We think that the legislature intended by the act to so regulate the distribution of the funds available for road purposes as to secure a fair and equitable proportion of the fund for every part of the county; and to effectuate this purpose the Act of 1900 gave to the counties power to let out the roads as an entirety and by one contract or to let out each separate link or section of the road, to be worked by separate contracts. There is nothing in the statute requiring that every contract should be to separate individuals, but the intent of the statute is that every link or section of every road shall be figured upon and estimated and let out separately. The case of *State v. Vice, supra,* is directly in point here; and unless a plain and natural construction of the first, fourth and fifth paragraphs of ch. 119 of the statute justifies the county board in letting out the work, at and for a lump sum, then it must follow that the appellant's contract is a nullity.

Argued orally by *Garland Q. Whitfield,* for appellant.

MAYES, J., delivered the opinion of the court.

Chapter 119, § 1, p. 153, of the Laws of 1900, provides that the board of supervisors of the various counties of the state of Mississippi may, at the regular April term, or any other regular meeting after the passage of the act, meet and classify the public roads in their respective counties as roads of the first-

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class and roads of the second-class, which roads are to be divided into convenient links and worked by contract. By section 11 of the act it is provided that the act shall have no application to any county in the state, except it be so ordered by the board, which order shall be entered on the minutes of the board. At the regular May term in 1902 the board of supervisors of Pike county, by an order duly entered on the minutes, adopted chapter 119 as the road law for that county. Subsequently the board classified the public roads of the county into roads of the first-class and roads of the second-class, and divided same into convenient links, and inspected same as required. After noting the character and amount of work necessary to make them good and acceptable highways, the board made plans and specifications for the working of the roads and filed same with the clerk of the board of supervisors for the inspection of prospective bidders prior to the letting of the contract. After this was done the board advertised for bids as required by section 5 of the act, and let thhe contracts for working the public roads of the county.

Appellant, Quin, appeared and bid for the working of all the roads in the second and third districts at an aggregate value of $95 per mile for each of the districts. The bid made by Quin was made as a lump bid for the whole work to be done on the roads in the second and third supervisors' districts, and was not for each separate link advertised. The contract was duly let to him, and the aggregate amount of his bid for the two districts amounted to $24,272.50, for the three years for which the contract was let. The other three districts were bid upon by other parties in the same way, and let out to one D. M. Simmons and Smith & Winborn, so that all the roads of the county were let to be worked by contract. Quin duly executed a bond for the sum of $24,224, which bond was received and approved by the president of the board of supervisors. After being awarded the contract and executing the bond, Quin entered upon the work of the road. The county paid him for services rendered

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under this contract the sum of $19,853, leaving a balance due of $4,419.50. After full performance of the contract Quin made demand on the board for the balance due him, which it declined to pay, whereupon he brought this suit.

There are two counts in the declaration, one on the contract as made and the other on a *quantum meruit*. A demurrer was interposed by the county to both counts on the ground, first, that the declaration states no cause of action; second, that the declaration did not show by sufficient averment that the board of supervisors of Pike county put in operation the machinery provided by law for working the public roads by contract, and that the declaration did not show that the roads were divided and classified as provided by law; third, that the contract showed that the working of the roads was a contract for the working of the second and third districts of Pike county, and not for working the public roads of the county as an entirety, or by links and sections; fourth, that the contract is null and void, because the board of supervisors had no authority to make any such contract; fifth, that the second count undertakes to recover on a *quantum meruit*. This demurrer was sustained by the court, and the suit dismissed.

The declaration shows almost a literal compliance by the board of supervisors with every provision of the law in regard to working the roads by contract under the act above cited; the exception being in approving a bond for a little less than the amount of Quin's bid, the effect of which we will notice later. The board adopted the law in the manner required by chapter 119, and entered the order on the minutes. Afterwards it inspected and classified the roads into roads of the first and roads of the second-class, and divided them into convenient links. After this they advertised the letting of the contracts as required by section 5. The contract was made in accordance with the requirements of this section; that is to say, they were let for a period of three years. In the specifications advertising these roads the links appeared as required by law, and there

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was nothing in law or in fact to prevent any one from bidding on any separate link so advertised, or on the whole or any part of the work to be done in the county. Nothing in the declaration shows that the board of supervisors precluded bids for separate links; but all they did was to accept the bid of Quin at an aggregate value of $95 per mile to work all the roads in supervisor's districts two and three. There is nothing in the law forbidding the board of supervisors from accepting or making such a contract; that is to say, for an entire supervisor's district. In order to make this contract valid it was not essential that each link should be contracted for separately. In furtherance of the best interest of the county the board could have accepted a bid for any link, or for any two or more links, or for all the links advertised in any supervisor's district, or for all the links advertised in one or more of the districts, at an aggregate value.

The case of *State v. Vice,* 71 Miss. 912, 15 South. 129, has no application to this case. That case was decided under section 3929, Code of 1892, which provided that each road or subdivision should be let under a separate contract, but the board of supervisors in disregard of this provision let the work in a lump contract, and the court held that the contract was void. There is no such provision as this in the Act of 1900. Nor is there anything in the Act of 1900 which requires a contract to be made for each division or road let. The facts in the case of *State v. Edwards,* 81 Miss. 399, 33 South. 172, make a very different case from the one presented by this record, and that case cannot be used as authority for any of the contentions made on the part of appellee. In the case of *Elmore v. State,* 81 Miss. 422, 33 South. 225, the opinion shows that the indictment did not charge that the board of supervisors had done any of the things which the law required to constitute a valid contract. The court held, on a demurrer to an indictment against a party charged with violating the contract, as a matter of course, that because of the failure on the part of the board to

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make a valid contract no prosecution could be conducted against a contractor under section ten of the act for neglect of duty under the contract.

The only other point relied on by appellees is the fact that the amount of the bid made by Quin was for $24,272.50, and the bond given was only $24,224. The bond given was for a little less than the bid, whereas the law provided that it should not be less than the amount of the bid. It is manifest that this was a mere unintentional error on the part of the board, not substantial in nature or an intentional disregard of the statute. We do not think this irregularity is sufficient to invalidate the contract in this case. In the *Edwards case, supra,* the facts show that the board affirmatively ordered a bond to be executed in violation of the positive requirements of the statute. Such is not the case here, nor is there any substantial discrepancy.

The judgment is reversed and cause remanded.

WILLIAM VAILS v. STATE OF MISSSISSIPPI.

94 365
95 881

[48 South. 725.]

CRIMINAL LAW AND PROCEDURE. *Witnesses. Credibility. Instructions. Curatives.*

An instruction for the state in a criminal case, wherein defendant testified in his own behalf, authorizing the jury in determining the weight to be given the testimony of any witness to consider his interest in the case, or want of it, and the reasonableness or unreasonableness of his testimony, is not erroneous as pointing out the accused to be disbelieved, where another testified in his behalf to nearly all of the material facts; but if erroneous, the error was cured by another instruction telling the jury that they could not arbitrarily disregard defendant's testimony because he was the defendant, but should give it the same consideration as the testimony of any other witness.

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Brief for appellant.

FROM the circuit court of Sunflower county.

HON. SYDNEY SMITH, Judge.

Vails, appellant, was indicted and tried for the murder of one James Taylor, convicted of manslaughter, sentenced to the penitentiary for fifteen years, and appealed to the supreme court.

Appellant did not deny the killing, but claimed that he shot the decease in self-defense. The evidence showed that appellant, Taylor and another were passing the home of appellant's brother-in-law, Lloyd, at night, when an altercation arose between appellant and Taylor, both of whom were under the influence of whiskey, as a result of which Taylor was shot by appellant, and killed. Appellant and Lloyd, his brother-in-law, both testified on the trial. The fourth instruction given for the state, quoted in full in the opinion, was complained of by appellant in the motion for a new trial and in the supreme court.

The appellant's counsel contended with much force that their client was, under the circumstances shown in evidence, entitled to be treated as the only witness who testified to the material facts of the case.

Chapman & Quin and *Charles L. Garnett,* for appellant.

Code of 1906, § 1918, reads as follows: "The accused shall be a competent witness for himself in any prosecution for crime against him," etc. This was intended to serve a wise purpose. When the legislature made the accused a competent witness for himself, it did not intend that his testimony should be hampered and annuled by instructions calling to the attention of the jury and telling them to consider the defendant's interest in the final result of the trial; and the fourth instruction for the state in the case at bar could have had no other effect upon the jury than to instruct and induce them to mistrust or disregard the defendant's testimony; for he was the only witness who had an interest in the result of the trial, and the only eye-witness in his own behalf. His testimony is a vital constituent part of

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Brief for appellee.

the whole evidence. Therefore, the court erred in giving the fourth instruction.

Said charge is erroneous because it contravenes Code 1906, § 1918, and is upon the weight of the evidence. It violates the right of the accused to have his testimony go to the jury unaccompanied by suggestions calculated to detract from its value in the estimation of the jury. Telling the jury that in weighing the "testimony of each witness they may take into consideration the interest, or the lack of interest, the reasonableness, or the unreasonableness, of the testimony," brings the instruction within the inhibition laid down in *Buckley v. State,* 62 Miss. 705.

The *Buckley case* seems to have been the last case in our reports in which specific and direct reference was made to the testimony of the defendant. In the later cases such references have been general and indirect, but the result has been the same; that is to say, the court has not permitted artful circumvention to effect what could not be dishonestly accomplished. *Glenn v. State,* 64 Miss. 724, 2 South. 109; *Woods v. State,* 67 Miss. 575, 7 South. 495; *McEwen v. State,* 16 South. 242; *Rucker v. State,* 18 South. 122; *Smith v. State,* 90 Miss. 111, 43 South. 465; *Townsend v. State,* 12 South. 209.

George Butler, assistant attorney-general, for appellee.

By Code 1906, § 1918, the accused is made a competent witness in his own behalf, and by Code 1906, § 1915, it is provided that "such weight shall be given to the evidence of parties and interested witnesses as, in view of the situation of the witnesses, and other circumstances, it may be fairly entitled to." Under Code 1906, § 1923, "any witness may be examined touching his interest in the cause or his conviction of any crime, and his answers may be contradicted." It has been held that when the defendant takes the witness' stand, he assumes all of the incidents of a witness. *Mackmasters v. State,* 83 Miss. 1, 35 South. 302; *Williams v. State,* 87 Miss. 373, 39 South. 1006.

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Opinion of the court.

In this case Lloyd, appellant's brother-in-law, an important and material witness of the homicide, testified to all of the circumstances in corroboration of appellant's claim of self-defense, although his opportunities to know all the facts were not the best. Under the circumstances, the instruction for the state, complained of by appellant, was not legally prejudicial to the rights of appellant.

The cases cited by learned counsel for appellant are not in point here. In each case cited it will be found that the defendant was the only person who testified in his own behalf on the material facts of the case.

But even if the fourth instruction, taken alone, were erroneous, such error was cured by the instructions granted in favor of appellant. Especially did the eighth instruction for appellant charge the jury that appellant must be looked on as a competent witness and that his testimony should not be arbitrarily disregarded merely because he was the defendant in the case. This eighth instruction also charged further that appellant's testimony should be considered just as the jury considered the testimony of other witnesses.

WHITFIELD, C. J., delivered the opinion of the court.

On the testimony in this case, not only were the jury well warranted in rendering the verdict which they did render, but it does not seem to us at all probable that any other verdict could be rendered on a new trial. We think, therefore, the right result, so far as the testimony is concerned, has manifestly been reached.

The chief contention of learned counsel for appellant is that the court committed error—reversible error—in giving the fourth instruction for the state. That instruction is in the following words: "The court instructs the jury, for the state, that they are the sole and exclusive judges of the weight of the evidence and the credibility of the witnesses, and in determining the weight to be given to the testimony of each witness they may

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take into consideration the interest or the lack of interest, the reasonableness or the unreasonableness, of the testimony; and, if they believe from the evidence that any witness has wilfully sworn falsely to any material matter in this case, then the jury may disregard the whole testimony of such witness or witnesses, if they believe it untrue." This instruction must be taken in connection with instruction number eight, given for the defendant: "The court instructs the jury, for the defendant, that the law makes the defendant a competent witness for himself, and permits him to testify in his own behalf, and his testimony you cannot arbitrarily, under your oath, disregard, simply because he is the defendant in the case; but it is the duty to consider Vails' testimony, as you consider the testimony of any other witness in the case, and, if you have no other reason to disbelieve him as a witness than the fact that he is the defendant in the case, then it is your sworn duty to believe him, and believe that he spoke the truth, and if it is sufficient, in connection with the other testimony in the case, to raise in your minds a reasonable doubt of his guilt, then you should promptly find him not guilty." The objection urged to the fourth instruction is that it directly points out the defendant alone, and is therefore within the condemnation of various cases cited in the brief of learned counsel for appellant, especially the case of *Buckley v. State,* 62 Miss. 705.

We remark, first, that if there was any error in this fourth instruction given for the state on this point, it was certainly cured by the eighth instruction, just above set out, given for the defendant on the same point. It would be difficult, indeed, to frame an instruction on this point more favorable to the defendant than this said eighth instruction is. But, second, we remark that in nearly all the cases cited by appellant's counsel the instruction condemned either directly referred to the defendant alone, or by necessary implication, and in nearly all the cases the defendant was the only witness on his behalf in the case. This last observation is true of the cases of *Smith v. State,* 90

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Brief for appellant.

Miss. 111, 43 South. 465, 122 Am. St. Rep. 313, *Gaines v. State,* 48 South. 182, *Wood v. State,* 67 Miss. 575, 7 South. 495, and practically *Glenn v. State,* 64 Miss. 724, 2 South. 109, since in that case the defendant was the only person who made a statement which he had denied under oath. In this case Lloyd, the brother-in-law of the defendant, testified in his behalf to nearly all the material facts. So that it is not true of this case, either that the defendant was the only witness testifying in his behalf, or that this instruction necessarily pointed to him and him alone. The instruction in the *Buckley case, supra,* which was condemned, was as follows: "It is true that under the laws of this state the defendant is a competent witness in his own behalf; but in weighing his testimony the jury should consider the interest he has in the result of the same, and they may disregard it altogether." It is perfectly manifest that the difference between that instruction and the instruction in this case is as wide as the distance between the poles.

There was not only no reversible error, but no error at all, in giving instruction No. four for the state. Wherefore the judgment is *affirmed.*

SARAH WOODSON v. STATE OF MISSISSIPPI.

[48 South. 295.]

CRIMINAL LAW AND PROCEDURE. *Misdemeanor. Affidavit charging. Necessity for.*

A conviction for a misdemeanor must be reversed if not predicated of an indictment or affidavit charging the commission of the crime.

FROM the circuit court of Marshall county.

HON. W. A. ROANE, Judge.

Mrs. Woodson, appellant, was tried and convicted in the circuit court, upon appeal from a justices' court of unlawfully selling intoxicating liquors, sentenced to fine and imprisonment; and appealed to the supreme court.

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Brief for appellant.

The affidavit which did service in the justices' and circuit courts as a charge against appellant was in these words:—

"State of Mississippi,

"County of Marshall.

"This day B. D. Rivers came and personally appeared before the undersigned, a justice of the peace in and for said county, and made oath that on the thirty-first day of Dec. 1907, in the city of Holly Springs in said county of Marshall, Sarah Woodson did feloniously sell intoxicating liquors in said city of Holly Springs near Salem Bridge in less quantities than one gallon; and that he was reasons to believe, and does truly believe that said liquors are now deposited, or concealed in some room of the house, or in some part of the premises, wherein said Sarah Woodson dwells, in said city, on Salem street.

"And that this suspicion is not feigned of malice to said Sarah Woodson but is founded on creditable information.

"Whereupon he prays a warrant directing search for said Sarah Woodson.

"B. D. RIVERS.

"Witness my hand and seal this 31st day of Dec., A. D. 1907.

"[SEAL] Jno. B. Howard, Mayor and J. P."

In the supreme court the appellant sought to reverse the judgment and dismiss the prosecution for the reason, as she contended, that there was no affidavit in the record charging any crime.

L. A. Smith, for appellant

The omission of an affidavit is jurisdictional in character. *State v. Morgan,* 79 Miss. 659, 31 South. 338.

The affidavit for a search warrant is a specific convenience arranged by the legislature for a specific purpose; and it was not intended to serve both to get evidence and to be itself the beginning of a prosecution. To construe the affidavit in this case as coming within the requirements of the constitution would be to hold that an affidavit intended to procure a search of suspicious premises is a sufficient indictment to support a conviction.

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Brief for appellee.

The statements in the affidavit in this case were intended to evidence the suspicion and belief that intoxicating liquors were concealed upon appellant's premises; and any averments beyond what was necessary for that purpose must be treated as surplusage. But, if the affidavit in this case was intended by the affiant to charge a crime, it is fatally defective. *Hall v. State,* 91 Miss. 216, 44 South. 826.

George Butler, assistant attorney-general, for appellee.

The affidavit which appears in the record sent up to the circuit court on appeal from the court of the justice of the peace, seems to be an affidavit for a search warrant rather than one charging the unlawful sale of intoxicating liquors. However it does sufficiently charge the unlawful sale of intoxicants and this is sufficient under the holdings of *Irby v. State,* 91 Miss 542, 44 South. 801. It is true that the affidavit does not conclude with the phrase, "against the peace and dignity of the state," and that this court has held, in *Love v. State,* 8 South. 465, in construing sec. 18, art. 6, of the Constitution of 1869, that an affidavit which did not so conclude was fatally defective. Under sec. 18, art. 6, of the constitution of 1869, it was prescribed that *all prosecutions* should conclude with the phrase quoted above; whereas, under our present constitution of 1890, section 169, only *indictments* are required to conclude with such phrase.

No question as to the insufficiency of the affidavit was raised on the trial in the court below. Under the circumstances, it is doubtful whether the question can now be raised in this court. In *Hall v. State,* 91 Miss. 216, cited by learned counsel for appellant, there was no affidavit at all in the record.

Here we have a record disclosing an affidavit, defective yet amendable, and charging a crime, a warrant on the affidavit, a judgment of the justiec of the peace before whom the affidavit was sworn out, and an appeal bond given by appellant on appeal to the circuit court. No question of irregularity of the proceed-

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Statement of the case.

ings was raised at any time during the trial in the court below and the appellant's present contention comes too late. *Short v. State,* 82 Miss. 473, 34 South. 353; *Calhoun v. State,* 86 Miss. 553, 38 South. 660; *Spivery v. State,* 58 Miss. 743.

WHITFIELD, C. J., delivered the opinion of the court.

No affidavit charging any crime is shown by the record to have been produced in either the justice's court or circuit court.

The judgment is reversed, and this prosecution dismissed, without prejudice to the right of the state to begin a proper prosecution.

Reversed and dismissed.

ABRAHAM STOVALL v. STATE OF MISSISSIPPI.

[47 South. 479.]

CRIMINAL LAW AND PROCEDURE. *Homicide. Murder. Accidental killing. Manslaughter instructions.*

Where a defendant charged with murder is either manifestly guilty as charged or wholly innocent of the crime, a state's instruction authorizing a conviction of manslaughter is fatally erroneous.

FROM the circuit court of Madison county.

HON. WILEY H. POTTER, Judge.

Stovall, the appellant, was indicted and tried for the murder of one Mary Jane Richards, was convicted of manslaughter and sentenced to the penitentiary for one and one half years, and appealed to the supreme court.

Appellant and the woman whom he killed met each other in the road a short distance from her home. Their past relationship had been friendly, in fact intimate. Appellant asked her for his pistol which she had borrowed from him the day before, and the woman, having it at the time upon her person, gave it to him. Appellant then asked her for its scabbard, and as she did not have it with her they went together to her home to get it,

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Brief for appellee.

one Prichard, who subsequently testified in the case, going along with them. Arriving at her home she gave the scabbard to appellant, and they engaged in friendly conversation, Prichard being near the doorway. The pistol was of the hammerless kind, and while they were talking the weapon was suddenly discharged, the bullet from it striking the woman in the head and killing her instantly. Appellant testified that the pistol was accidentally discharged while he was attempting to break or unbreech it. Prichard testified that there had been no quarrel or unfriendly conversation between appellant and the woman prior to the homicide, that he saw the shooting but was unable to say whether it was intentional or accidental. No motive whatever was shown for the shooting, no bad feeling was shown to have existed, between appellant and the woman at any time prior to the killing. Immediately after the shooting the appellant notified the owner of the farm he worked of the killing, came to the county seat, and voluntarily surrendered to the sheriff, expressing his regret at the occurrence, and stating that it was an accident.

W. H. Powell, Huber & Powell, for appellant.

Under the facts in evidence, the appellant cannot be guilty of manslaughter, even though the jury found him so. Appellant was either guilty of murder or the killing was accidental and he was excusable. There can be no grade in the offense, if he intentionally killed the deceased.

The first instruction for the state is fatally erroneous in charging the jury as to manslaughter. As said by this court in *Virgil v. State,* 63 Miss. 317, "the danger from such an instruction is that the jury may take license from it to find a verdict of manslaughter upon testimony upon which they would shrink from rendering a verdict of guilty of the higher crime charged."

George Butler, assistant attorney-general, for appellee.

As a proposition of law the first instruction for the state is not erroneous. By it the jury are advised that every willful

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Statement of the case.

killing of a human being, which is not warranted or excused by law, is either murder or manslaughter; manslaughter if done in the heat of passion, and murder if deliberately done. *Evans v. State,* 44 Miss. 762; *Hawthorne v. State,* 58 Miss. 778; *Murphy v. State,* 89 Miss. 827, 42 South. 877.

WHITFIELD, C. J., delivered the opinion of the court.

On the facts in this case this killing was most manifestly murder or nothing. If the killing was accidental, the defendant was guilty of no offense. If it was not accidental, he was guilty of murder beyond all controversy.

The giving of a manslaughter instruction in such a case was manifestly error, and for this error the judgment is reversed, and the case remanded. *Virgil v. State,* 63 Miss. at page 320.

WILLIAM BARTON v. STATE OF MISSISSIPPI.

[47 South. 521.]

1. CRIMINAL LAW AND PROCEDURE. *Rape. Assault to. Indictment. Code* 1906, § 1359. *Ex post facto law. Code* 1892, § 967.

An indictment predicated of Code 1906, § 1359, a new statute making it a felony, punishable by imprisonment for life or such shorter time as the jury may fix, to assault with intent to forcibly ravish any woman of previous chaste character:—

(*a*) Cannot be maintained by proof of acts committed before the statute because operative; nor

(*b*) Be referred to Code 1892, § 967 (re-enacted Code 1906, § 1043), in force at the time of the acts, making it a felony, punishable by imprisonment not exceeding ten years, to assault a woman with intent to ravish her.

2. SAME. *Punishment.*

A defendant convicted of a felony punishable by imprisonment in the penitentiary for life or such shorter time as the jury may fix, cannot, in the absence of a verdict fixing the imprisonment, be sentenced for a term of years fixed by the court.

FROM the circuit of, first district, Yalobusha county.

HON. SAMUEL C. COOK, Judge.

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Brief for appellant.

Barton, appellant, was indicted and tried for assault with intent to commit rape upon Susan Barton, a woman of previous chaste character, was convicted, sentenced to the penitentiary for five years, and appealed to the supreme court.

The indictment was returned by the grand jury on February 11, 1907. The evidence showed that the alleged crime was committed September 1, 1906. The indictment contains the following words: "Did with force then and there in and upon Susan Barton, a female person of previous chaste character, willfully, maliciously and feloniously assault the said Susan Barton with the intent of him, the said William Barton, then and there to forcibly ravish," etc.

Code 1906, § 1359, which became operative October 1, 1906, is as follows:

"Every person who shall be convicted of an assault with intent to forcibly ravish any female of previous chaste character shall be punished by imprisonment in the penitentiary for life, or for such shorter time as may be fixed by the jury."

Prior to October 1, 1906, the law applicable to such an offense was contained in Code 1892, § 967, providing that persons convicted of assaults with intent to commit rape should be punished by imprisonment in the penitentiary for a term of not more than ten years.

The jury returned a verdict of guilty as charged, and the court sentenced appellant to a term of five years' imprisonment in the penitentiary.

Isaac T. Blount, for appellant.

The indictment on which appellant was tried and convicted was returned into court by the grand jury, and marked filed, on February 11, 1907. It was clearly drawn under Code 1906, § 1359, and, as this court judicially knows, that code went into effect, and superseded the Code 1892, on October 1, 1906. The evidence shows conclusively that the alleged crime, if committed at all, was committed September 1, 1906, one month before the Code of 1906 became operative.

Code 1906, § 1359, is new law in our state. It distinctly

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provides that the defendant, when found guilty, shall be punished by imprisonment in the penitentiary for life, unless the jury—not the trial judge—shall fix the imprisonment for a lesser period. It will be noted however that the jury in this case merely returned a verdict of "guilty as charged," and did not fix any term of imprisonment at all.

The attention of the court is called to the fact that, as the crime was shown to have been committed on September 1, 1906, the only statute applicable, and under which indictment should have been drawn, if at all, is Code 1892, § 967. By examining the indictment in this case it is manifest that it was predicated not of Code 1892, § 967, but of Code 1906, § 1359. The attention of the court below was called to the point, but without effect.

George Butler, assistant attorney-general, for appellee.

The indictment was returned in February, 1907, and the appellant was tried at the ensuing July term of the court. Appellant's contention seems to be that under Code 1906, § 1359, it was the province of the jury to specify the punishment, or, at least, in case they did not, then the court could only sentence appellant to the penitentiary for life.

At the time the offense was committed, Code 1906, § 1359, was not in effect; it is a new statute and appears for the first time in Code 1906. Prior to the enactment of this statute the punishment was prescribed by Code 1892, § 967. Of course Code 1906, § 1359, has no retroactive effect. But by Code 1906, § 5, the offense having been committed prior to October 1, 1906, the case was unaffected. *McGuire v. State*, 76 Miss. 504, 25 South. 495; *Lindsey v. State*, 65 Miss. 542, 5 South. 99; *Wheeler v. State*, 64 Miss. 462, 1 South. 632; *Wilkerson v. Hudson*, 71 Miss. 130, 13 South. 866.

WHITFIELD, C. J., delivered the opinion of the court.

The indictment in this case was manifestly drawn under Code 1906, § 1359, a new statute first introduced by that code. That code went into effect October 1, 1906. The evidence shows

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Syllabus.

conclusively that the alleged offense was committed September 1, 1906. No indictment, of course, could have been predicted of this statute for an offense committed before the statute was a law. This point was raised in the court below and overruled. The trial was proceeded with, and the defendant convicted and sentenced to the penitentiary for five years. Code 1906, § 1359, under which alone manifestly he was indicted—the indictment pursuing the very language of the statute—required the punishment to be for life, unless the jury fixed a shorter term. The verdict of the jury in this case simply found the defendant guilty as charged, without fixing any term of imprisonment at all, and yet the court imposed a sentence of five years. This was erroneous. The defendant was manifestly indicted under this section alone and could have been punished only under this section under an indictment framed specifically on the section with a verdict of guilty as charged in that indictment. The judgment is reversed and the cause remanded.

The defendant will be held to answer such proper indictment as may be presented against him.

Reversed.

JENNIE OWENS v. YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

[47 South. 518.]

1. RAILROADS. *Injury to persons living in cars. Negligence. Rules of company.*

rule of a railroad company, constantly disregarded by it and never brought to the attention of its employes, does not affect its liability for negligence to a member of the family of its extra gang foreman living with him in its camp cars to its knowledge and in accordance with its custom; the foreman and the members of his family never having heard of the rule.

2. SAME. *Degree of care due.*

A railroad company allowing the family of its extra gang foreman to live with him in its camp cars owes them the duty of ordinary

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Brief for appellant.

care, and cannot escape liability to one of them arising from its negligence by showing simply that it did not wilfully injure her.

3. SAME. *Case. Question for jury.*

Whether a railroad company used the ordinary care which it owed to the members of the family of its foreman, who with its knowledge and consent, and in accordance with its custom, lived with him in its camp cars, is a question for the jury, the plank walk between the doors of the two cars being only twelve to fourteen inches wide, while ordinarily those furnished were thirty to thirty-six inches wide, and the car having, the night before the foreman's daughter was injured by the tilting of the plank while she was crossing it, been put by the company on an unballasted roadbed where one rail of the track was higher than the other.

FROM the circuit court of Yazoo county.

HON. WILEY H. POTTER, Judge.

Jennie Neal Owens, an infant, suing by her mother as next friend, appellant, was plaintiff in the court below; the railroad company, appellee, was defendant there. From a judgment, predicted of a peremptory instruction, in defendant's favor, the plaintiff appealed to the supreme court.

The opinion of the court state the facts.

M. B. Grace, for appellant.

The evidence shows that there was a general custom of the railroad company to furnish to extra gang foreman and their families camp cars properly fitted up for the purpose of being used as their homes. Of course the duty thereupon devolved upon the railroad company to furnish reasonably safe cars and appliances for such occupancy. This was read into every contract of employment and became a part of the contract when a section foreman would be ordered to take an extra gang to a place where there was no section house. Furthermore it was necessary that such cars should be kept in a reasonably safe condition as they were moved to and fro. Inasmuch as the families of the foremen live in such cars by invitation and consent of the railroad company, the company owes a duty of care and protection to the members of his family as well as to the foreman, in

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every case. *White v. Louisville, etc., R. Co.*, 72 Miss. 12, 16 South. 248; *Illinois, etc., R. Co. v. Woolley*, 77 Miss. 297, 28 South. 26.

It has been held that one who boards a railroad freight train while it is being loaded, with the permission of the conductor, is not a trespasser or mere licensee and is not to be deemed guilty of contributory negligence by reason of so doing, unless he does so with knowledge that the conductor is exceeding his authority and violating the prescribed rules of the railroad company, in allowing him thus to board the train. *Alabama, etc., R. Co. v. Yarbrough*, 83 Ala. 238, 3 South. 447; *Wagner v. Missouri, etc., R. Co.*, 97 Mo. 512, 10 S. W. 486; *Young v. Pennsylvania etc., R. Co.*, 115 Pa. St. 112, 5 Cent. Rep. 848.

The railroad company was under a duty to furnish the appellant's father and family a reasonably safe place in which to reside, if it undertook at all to furnish a dwelling place. But in this case, the tracks were improperly constructed and in dangerous condition, and the conductor wilfully and maliciously refused to replace the cars, but, with an utter disregard of human life, allowed the engine and train to kick the cars and let them roll and stop where they would.

Inasmuch as the appellant was upon the cars by the acquiescence of the railroad company she was not a trespasser. As a child of tender years she was compelled to go wherever her father went. *Alabama, etc., R. Co. v. Yarbough, supra; St. Joseph, etc., R. Co. v. Wheeler*, 35 Kan. 185, 10 Pac. 461.

Appellant's suit is not based upon contract, but is a case in tort. She was not a licensee of the company. And the duty of the railroad company to use reasonable means to protect her was not complied with, hence the company is liable for negligence, since the negligent acts of its employees, other than her father, caused the injury. *Mackey v. Vicksburg*, 64 Miss. 777, 2 South. 178; *Stevens v. Yazoo, etc., R. Co.*, 81 Miss. 195, 33 South. 311.

Even if appellant's father had been guilty of negligence, this

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Brief for appellee.

would not preclude appellant, an innocent person, from recovery. *Westbrook v. Mobile, etc., R. Co.*, 66 Miss. 560, 6 South. 321; *Vicksburg v. McLean*, 67 Miss. 4, 6 South. 744.

Mayes & Longstreet, and *C. N. Burch*, for appellee.

No privity of contract existed between the appellant and appellee in any way imposing on the appellee the obligation of providing appellant, a nine year old girl, with all possible safeguards from injury in and about camp cars. Such cars are necessarily rude affairs, and cannot be provided with all conveniences.

The facts are uncontroverted that appellants's father and mother had used these cars for three weeks before the injury; that the cars were under the dominion and control of appellant's father; and that at no time had any complaint ever been made by appellant's parents to the appellee as to the insufficiency of any of the appliances of the cars.

The appellant was not a child below the years of discretion. She was between nine and ten years old, and appears to have been a bright and intelligent child. Under the circumstances she was a mere licensee, and it would be straining the law to say that under such circumstances the railroad company was bound to know that a child of her age was a member of the family and to take such precausion and to provide such safeguards in rough camp cars as would prevent any possibility of injury to her.

Suppose the child had fallen from one of the open side doors of the camp car, from which there can not well be permanent steps to the ground. Could it then be argued with effect that the railroad company was under obligation to provide safeguards across the door such as would prevent injury to a child of her age, or to provide permanent steps so safely and widely built as to afford the child safe and convenient modes of ingress and egrees?

As appellant was a mere licensee, the railroad company was not under positive and existing obligations to her except to re-

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frain from wilful injury or from such acts of wilful recklessness, with full knowledge of her situation, as would cause her injury.

Even if it be said that appellant's father, the section foreman, has caused his wife and daughter to occupy the camp car with him, and therefore the wife and daughter were not trespassers, yet the fact remains that under the circumstances the wife and daughter would be mere licensees as to whom the appellee would owe only the duty to avoid wilful or intentional injury. *Lovett v. Railroad Company,* 79 S. W. 514.

It is shown that the mode of passage between the two cars was reasonably safe for a prudent and reasonable person, and that it could be used for the purposes for which it was provided. In fact, the evidence discloses that such mode of passage was the one in long and continued use generally between camp cars. The character of the passageway was obvious, and could easily have been seen by appellant. It had been used the very morning of the accident by the father and mother of appellant, and also by appellant herself. Under such circumstances, the court below properly awarded a peremptory instruction in favor of the appellee. *Turner v. Railroad Co.,* 100 N. W. 268.

WHITFIELD, C. J., delivered the opinion of the court.

This action is by Jennie Owens, a minor, about nine years of age at the time of the injury, through her next friend, for $15,000 damages for an injury charged to have been negligently inflicted upon her by the appellee. At the conclusion of the testimony, the court, upon motion of appellee, excluded the testimony of the plaintiff, and gave a peremptory instruction for the defendant, and this is assigned for error. This case is a very delicately balanced one upon its facts, and therefore a careful statement of the case will be made.

The father of the plaintiff had been a section foreman. He was at the time of his injury the foreman of an extra gang.

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Opinion of the court.

One difference between the two is that the section foreman is stationed at a particular place, and lives in an ordinary house with his family, whilst the foreman of an extra gang lives with his family in a set of cars known as "camp cars;" in other words, in a movable house, which is taken hither and thither as the railroad company's needs may require. It is quite clearly shown that it was the practice and custom of appellee to furnish such camp cars, and to allow the family of the foreman to live with him in this movable house. The camp cars in question were composed of several box cars. One the foreman and his family used as a bedroom. The next they used as a dining room, and in the others the men composing the gang slept. Ingress and egress from one of these cars to the other was effected by means of a door cut out of the end of these cars, of about the usual size of a door. A small board, about twelve to fourteen inches in width, and just long enough to reach between the two cars, was used as the platform, or rather footway, between the cars. When the cars would be moved, this board was taken up and put inside of a car. When the cars would stop, it was put back again between the doors of the two adjoining cars, the bedroom and the dining room, by the company. The place on the track at which these camp cars were first placed was perfectly level, and the roadbed properly constructed. This family, father, mother, and the daughter, remained in these cars at this original point for about three weeks, using this plank without any accident occurring. One night after this a freight train of the defendant company moved these cars from their place, in order to connect with a car which it was desired to take away, and when this freight train turned the camp cars loose, instead of placing them where they had been, it kicked them loose and let them roll, to stop where they might. They did stop at a different place on the roadbed, where the track was not level, one rail being higher than the other, inducing a slanting position, or incline, of the roadbed, and the roadbed, at this point, was not ballasted. The next morning, after this material change in loca-

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tion, the plaintiff in attempting, for the first time after such change, to go from the bedroom into the dining car, stepped upon this connecting plank, and the plank tilted and threw her down on the rail, producing the injuries complained of. The grandfather of the plaintiff, introduced by the defendant company, shows without dispute that it was the duty of the company to furnish these cars, and that a plank or platform connecting the doors of the two adjoining cars, in order to be the proper width, should have been of the width of from two and a half to three feet, or of the width of the door. He states that this width was the customary width, and that the company usually furnished that sort of connecting platform or plank. The particular plank in this case was only twelve to fourteen inches in width. It is made clear that the company allowed at the time of this injury, and had been allowing, the families of the foreman of extra gangs of this sort to live with them in these camp cars, and it is clear that the company knew that this wife and daughter lived with the husband and father in these cars, and permitted them so to live. That was the customary thing at the time of this injury. A rule seems to have been adopted forbidding this, which rule was never brought to the knowledge of the plaintiff, or her father or her mother, until after this injury, and for that reason, of course, cuts no figure in this case. The girl in question was the average girl of about nine years. There is no effort, one way or the other, to show precocity or dullness of intellect. It is shown that when she was about six months old, she suffered an injury in one of her hip bones; the result which came about was that one leg was shorter somewhat than the other, and caused her to limp, and, when she walked, resulted in her putting her toe to the ground instead of her heel. The testimony very satisfactorily shows that, after treatment by a reputable physician for a period of two months for this ailment some six months before this injury, this early trouble had been practically cured, and there is nothing whatever in the testimony to suggest that her fall was in any way due to this early

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trouble. That may be, therefore, put aside as uninfluential in arriving at the proximate cause of this injury. It also appears from the testimony of the girl that when she put her foot upon this little plank on the morning of the injury, using it for the first time in that new location, the plank tilted, and she expressly states, with great clearness, that it was the slanting position of the rails, the incline induced by the unlevelness, which caused the plank to tilt, and throw her down on the rail. She swears to this positively. There is no question here of contributory negligence. This action is by the child alone for the injuries to herself, and there is nothing in the testimony which would warrant the court in saying as a matter of law that the child herself could be charged with contributory negligence.

It is very earnestly insisted by the appellee that these three persons had used this plank for three weeks constantly just prior to this injury, and that no accident had happened during that time, and that no complaint had been made of the plank as unsafe, and that from these and other circumstances it was clear as a matter of law, that this plank, constituting the passageway, was a reasonably safe passageway; but this argument fails entirely to take account of the very important facts that there had been overnight a complete change in the character of the track on which these camp cars were left to stand. The first place had been level and properly constructed; the second was unlevel and slanting, and not ballasted—most material differences, entering into the question of the safeness, of this plank used as it was. It might have been safe possibly under favorable conditions as to the levelness of track, and unsafe where it spanned the distance between two tilted cars; and a plank so small might well have been seriously influenced by slight changes of this sort as regards its safeness for such use. There is nothing in the evidence, it must be remembered, to contradict the positive statement of the girl that her fall was directly due to the tilting of the plank, and that that was directly due to the fact that one rail was higher than the other; in other words, that

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there was a slanting attitude of the rail and roadbed, and, of course, of the car. Then it is most earnestly insisted that the testimony of different witnesses shows that this appliance was safe; that the railroad had furnished the usual passageway; that it had done what its custom and practice required, and that the passageway which it furnished, to wit, this plank, was a reasonably safe appliance; and that this appeared so clearly that the court could know it to be so safe from this testimony as a matter of law. But this argument overlooks two most material facts: First, the differences we have just pointed out in the two location of the camp cars; and, secondly, the potent fact that this very man had testified that such plank, to conform to the usage and custom of the company, had to be from two and a half to three feet wide, whereas, this one was only twelve to fourteen inches wide. Finally, it is most earnestly argued that this little girl at most could only be said to be a mere licensee; that she had no contract relation with the company; that there was no privity of contract, and no relationship resulting from contract between her and the company; and that as a result of this the company owed her no duty save not willfully to injure her. To this argument there are two conclusive answers: First. This suit does not sound in contract. It does not proceed upon the basis of any contract relation whatever between the girl and the company. It is an action for the tortiously negligent act of the company. And second, it is not entirely accurate to say that she was a mere licensee. Undoubtedly she was not a trespasser in any sense. She was where she was with the full knowledge and consent of this company, in accordance with its usage and custom, and, being where she was with such full knowledge and consent on the part of the company itself, the company owed to her the nondelegable duty of the master to furnish a safe place to live, amongst other things being involved, a safe platform to pass from car to car, and it also owed her the duty of ordinary care. It certainly did not owe her the duty of extraordinary care in the absence of any contract relations, such as exist between the passenger and the company. It certainly did owe her

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in her situation, being where she was, with the knowledge and consent of the company, the duty of ordinary care.

See, as directly in point on the foregoing proposition, the following case: *St. Joseph, etc., R. R. Co. v. Wheeler,* 35 Kan. 185, 10 Pac. 461. Indeed, we touch the crux of this case, reviewing the action of the court, which decided as a matter of law that she had no cause of action, when we determine what grade of care under the law the company was under the duty of exercising towards her situated as she was. We are clearly of the opinion that the degree of care was more than the duty of not willfully injuring her, that the company was due her ordinary care, and this, of course, brings us squarely to this question: The company owing the plaintiff the duty of ordinary care, was not the question whether that degree had been used, as shown by the evidence in the case, a question of fact, pure and simple, for the solution of the jury, and not a question of law for the court? Undoubtedly it was a question of fact, and the court clearly erred in not submitting that question of fact to the jury, under proper instructions, for its solution.

We have not often seen a case in which what we have said in in the case of *Bell v. Southern Railroad Company,* 87 Miss. 234, 30 South. 821, fits so perfectly. We there said, and we repeat it here once more, hoping that more heed may be given to it in the future, as the thoroughly safe rule for the guidance of courts below touching this matter: "So many questions are integrated usually into the solution of the question of negligence, it is so necessary to carefully examine all the circumstances making up the situation in each case, that it must be a rare case of negligence which the court should take from a jury." We think this case falls peculiarly within the principle just declared, and that there was error, and that it was fatal error, for the court to undertake to determine, as it did, as a matter of law the question of pure fact, whether the company had exercised towards this plaintiff under all the facts in evidence ordinary care.

Wherefore the judgment is reversed, and the case remanded for a new trial. *Reversed.*

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Brief for appellant.

BENJAMIN J. HUBBARD v. CAROLINE HEMPHILL.

[47 Miss. 657.]

COSTS. *Witness fees. Code* 1906, § 2200.

A litigant who has been adjudged entitled to recover costs, cannot compel his adversary to pay witness fees, unless the statute, Code 1906, § 2200, regulating the subject has been observed.

FROM the chancery court of Grenada county.

HON. ISAAC T. BLOUNT, Chancellor.

Mrs. Hemphill, appellee, was complainant in the court below; Hubbard, appellant, was defendant there. At the next term of the court following a final decree against him, taxing him with costs, defendant made a motion to retax the costs in the case, and from a decree denying the motion, appealed to the supreme court.

Appellant's motion showed that three witnesses for complainant, the total of whose fees as taxed amounted to $54, had not made affidavits of their attendance at the trial, and the clerk of the court had not issued witnesses' certificates to any of them, but had, of his own volition, erroneously taxed the amounts claimed by them as witnesses, in the cost; that appellee, at whose instance the three witnesses were subpoenaed, had never filed any certificates among the papers, nor requested the clerk to tax them in the cost. Evidence was heard on the motion, and the court found that affidavits had not been taken and certificates issued, but that the witnesses had actually attended court and testified, and therefore should receive compensation, and the court then ordered the clerk to issue the certificates, and overruled appellant's motion.

Cowles Horton, for appellant.

Code 1906, § 2200, provides that a witness shall not be entitled to charge for his attendance in a civil case at any term of

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the court unless, during the term or within five days thereafter, he shall prove his attendance and obtain a certificate in the manner directed.

It is undisputed that these witnesses did not prove their attendance and that they did not obtain certificates in the manner prescribed by the statute. Hence the decree must be reversed and the case remanded. *Patty v. Sparkman*, 58 Miss. 76; *Barton v. Parker*, 57 Miss. 144; *Marshall Co. v. Tidmore*, 74 Miss. 317, 21 South. 54; *Hall v. Moore*, 70 Miss. 75, 11 South. 655.

Roane & Roane, for appellees.

The record shows that the three witnesses for complainant were in attendance upon the trial of the cause wherein the costs were taxed, in obedience to the process of the court, and that they were in attendance on the day the final decree was rendered, and that immediately after the rendition of the decree they went to the chancery clerk and stated to him that they had come to prove their attendance giving him the number of days of their attendance and the mileage of each witness respectively. The chancery clerk testified that when the witnesses appeared before him and stated the foregoing, he made memorandum of the number of days' attendance and the mileage as given him. The court below held, under these circumstances, that the witnesses had done all they could possibly do, and that there was no dereliction of duty on their part, and ordered that certificates be issued to them and filed in the cause, and this was promptly done.

The cases cited by appellant have no bearing upon the issue here.

WHITFIELD, C. J., delivered the opinion of the court.

Code 1906, § 2200, is in the following words: "*Witness Fees in Civil Cases—How Certificates for Obtained.*—The fees to which a witness may be entitled in a civil case shall be allowed,

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on the affidavit of the witness, stating the number of days he has attended, and the amount of mileage, toll and ferriage to which he is entitled, to be taken and preserved by the clerk of the court, master or other officer before whom the witness was called to testify, and a certificate of the allowance shall be given to the witness. A witness shall be entitled to demand, at the expiration of each day, his compensation for attending on that day; and if the same be not paid, the witness shall not be obliged to attend further until the compensation for his previous attendance shall be paid, unless the party liable make and file an affidavit of his inability to pay. The party paying a witness attending on his behalf may file the certificate of the witness among the papers in the cause, and if he recover costs therein, the amount shall be taxed in the bill of costs. Any witness may sue for and recover from the party on whose behalf he was summoned the amount specified in his certificate. Where a witness holds a certificate, and the same has been duly entered on the witness docket, it may be taxed and collected as other costs."

These witnesses had never proved their attendance by making the proper affidavits, and no certificates had ever been issued to them. Speaking with respect to a matter of this kind, the court said, in the case of *Patty v. Sparkman,* 58 Miss. 80: "However meritorious the claim for services rendered by an officer, if compensation for them is not provided by statute, it must be denied." And in the case of *Marshall County v. Tidmore,* 74 Miss. 317, 21 South. 51, speaking with reference to witness fees, this court laid down the same strict rule that the statute must be followed. The rule of the statute is not only reasonable, but wise. Compliance is easy, and the witnesses have nobody to blame but themselves.

The decree is reversed, and the cause remanded.

Reversed.

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Brief for appellant.

EDWARD HILL v. STATE OF MISSISSIPPI.

[49 South. 145.]

CRIMINAL LAW AND PROCEDURE. *Homicide. Justification. Self-defense. Apprehension of danger. "Great bodily harm."*

The rule in homicide cases that "great bodily harm," in contemplation of law, does not mean such harm as may be inflicted by mere blows with the hands or feet, is subject to the modification that where deceased was so much larger and stronger than defendant, that defendant was liable to receive great bodily injuries at his hands, he may be justified in using a deadly weapon to protect himself, although deceased was wholly unarmed.

FROM the circuit court of Yazoo county.

HON. WILEY H. POTTER, Judge.

Hill, the appellant, was indicted and tried for the murder of one Samuel Green, was convicted of manslaughter and sentenced to the penitentiary for a term of four years, and appealed to the supreme court. The opinion sufficiently states the facts.

Holmes & Holmes, for appellant.

The deceased was a negro of great physical strength, while the appellant is a man of comparatively small size. The evidence showed that the deceased was a man of violent character and, although at the time of the homicide he had no weapon, it was a matter of common knowledge in his community that he habitually carried concealed weapons. The quarrel between appellant and the deceased was originated by the deceased, and it was not until Green carrying a gun barrel, advanced upon appellant, striking at appellant and grazing his shoulder, that the appellant shot Green. In fact, appellant first offered no resistance to Green's attack but turned and ran down the road pursued by Green with the gun barrel. Under these circumstances the fourth instruction for the state was erroneous. We recognize the

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Brief for appellee.

well settled view of the law that one, in repelling the attack of an unarmed man of his own size, cannot slay him. For where two men are of equal size and physical strength the attack of one upon the other without a weapon does not furnish such other sufficient reason to anticipate great bodily harm or danger of life. But we cannot concede the positive statement of law without qualification or modification that the "great bodily harm" which the law contemplates may never be such as may be inflicted by mere blows with the hands or feet. We can conceive of cases in which a man of large size and great physical power might, without the use of a deadly weapon, or any weapon, but solely with the hands or feet, inflict great bodily harm, and probably fatal injury upon a man of small size and inferior strength; such as, for example, by choking him, or beating, kicking and stamping him in some vital part of his body. And the courts have recognized not only the possibility, but the probability of such cases, and in passing upon the question whether or not mere blows with the hands, fist, or feet, will excuse the use of a deadly weapon, they have adopted the negative view, always with this qualification, under ordinary circumstances, meaning thereby, under circumstances in which the combatants are of equal size and physical strength, or nearly so.

The court also erred in refusing to grant the two instructions for appellant, which were asked with a view of curing the error in the fourth instruction for the state. This court, through COOPER, C. J., has clearly decided that where there is a disparity in age, size or strength between two persons, the one may repel the attack of his superior in strength with a deadly weapon, even though his assailant be unarmed. *Hall v. State,* 1 South. 351.

George Butler, assistant attorney-general, for appellee.

It cannot be said that, as a matter of law, a case of self defense was indisputably shown by appellant. The question of whether or not "apparent danger" exists, is a question of fact

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and does not become a question of law except where the facts are absolutely determined and settled. *Long v. State,* 52 Miss. 23.

It is shown in the record that the appellant was physically unable to cope with Green, deceased, in a physical combat; and the theory of the defense on the trial was that Green was in the act of making a violent and deadly assault upon appellant when the fatal shot was fired. It will be noted that the deceased was unarmed and had no weapon about his person, but the defense contends that in view of his physical powers he was capable of inflicting this deadly assault with his hands and feet and it was to protect from such an assault thus about to be inflicted that the appellant fired. But in considering the propriety of the ruling of the court on these instructions, we must view it in the light of the record, in this case.

We have been able to find no case that holds that mere blows with the hands and feet are sufficient to justify the assaulted party in slaying his antagonist. In the instant case no assault had in fact been made. The deceased had not demonstrated his power nor his purpose to do great bodily injury to appellant.

Argued orally by *J. G. Holmes,* for appellant, and by *George Butler,* assistant attorney-general, for appellee.

WHITFIELD, C. J., delivered the opinion of the court.

The testimony in this case shows that the deceased, Sam Green, was physically "twice as stout and strong" a man as the appellant, and that he was also a man of vindictive and violent character. It is also shown that he had made a wholly unwarranted attack upon the appellant the evening before the killing, and that he was the aggressor in the difficulty in which he was killed. The testimony further shows that the appellant was a small man, incapable of coping with deceased physically, and that appellant was a man of good reputation, and was endeavoring all the time to avoid a difficulty with the deceased.

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Opinion of the court.

In this state of the evidence, the court gave for the state instruction No. 4, which is as follows: "The court instructs the jury that words 'great bodily harm,' in contemplation of law, do not mean such bodily harm as might have been inflicted by mere blows with the hands or feet"—and, having given this instruction for the state, refused the two following instructions for the defendant, which were asked with a view to cure the error in the fourth instruction for the state on the testimony in the record:

"The court instructs the jury that if the evidence shows that the deceased was physically capable of inflicting great and serious bodily harm upon the defendant with his feet or hands, and that the defendant had reason to believe and did believe that he was then and there in danger of such harm at the hands of the deceased, and fired the fatal shot to protect himself from such harm, then it is immaterial, and makes no difference, whether the deceased was armed or not at the time of the killing."

"The court instructs the jury that if the deceased was a much larger and stronger man than the defendant, so much so that the defendant was wholly and absolutely incapable of coping with him in a physical combat, and was liable to receive serious and great bodily injuries at the hands of the deceased in the event that they became engaged in such a combat, then the defendant was justified in using a deadly weapon to protect himself from an unjustifiable and deadly attack of the deceased, even though the deceased was wholly unarmed, and the defendant was in no danger from the deceased, except such as might be inflicted by the deceased with his hands or feet."

Instruction No. 4 for the state is plainly erroneous on the case made by the facts in evidence. It is doubtless true that one may not, ordinarily, repel the attack of an unarmed man, who is not his superior in physical power by killing him, because in such case the two men being, of equal size and physical strength, the attack of one upon the other, without a deadly weapon, does not furnish to the one attacked reasonable ground to anticipate dan-

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ger to life or the infliction of great bodily harm. But the trouble with this instruction No. 4 for the state is that it tells the jury, without qualification or modification of any kind, that the great bodily harm which the law contemplates never can be, under any circumstances, such as may be inflicted by mere blows with the hands or feet. This is palpably erroneous. There may be many cases in which the disparity between the combatants is so overwhelming that the one of superior physical power may inflict great bodily harm, or death itself, by mere blows with the hands or feet.

This doctrine is well settled by this court in the case of *Hall v. State,* 1 South. 351. In that case this court, speaking through COOPER, C. J., said: "Nothing appears in the evidence tending to show there was any disparity in age, size, or strength between the deceased and the defendant, and in the absence of such evidence the first instruction for the state was not erroneous. One may not repel the attack of an unarmed man, not his superior in physical power, by slaying him; for such attack does not furnish sufficient evidence to one of ordinary strength and courage to anticipate either that life will be taken, or great bodily harm done, such as justified the killing of his adversary."

In this case the evidence shows plainly such disparity in physical strength and power, and the giving of the fourth instruction, coupled with the refusal of the two instructions set out above, refused to the defendant, constitute fatal error.

We do not deem it necessary now to notice any other of the assignments of error.

The judgment is *reversed,* and the cause *remanded.*

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Brief for appellant.

EDWIN D. KIMBALL v. LOUISVILLE & NASHVILLE RAILROAD COMPANY.

[48 South. 230.]

1. TORTS. *Separate injuries from same act.*

Where plaintiff sustained injuries to his person and property by the same tortious act, the different injuries are merely separate items of damage and constitute only one cause of action.

2. SAME. *Res adjudicata. Splitting cause of action.*

A plaintiff, injured in his person and property by the same tortious act, who sued for, recovered and was paid the damages to his property, cannot afterwards recover for the personal injury, since he is not permitted to split up his cause of action.

FROM the circuit court of Harrison county.

HON. WILLIAM H. HARDY, Judge.

Kimball, the appellant, was plaintiff in the court below and the railroad company, the appellee, was defendant there. From a judgment predicated of a peremptory instruction in defendant's favor, the plaintiff appealed to the supreme court.

The opinion of the court state the facts.

Doty & Elmer and *J. H. Mize,* for appellant.

Appellant's suit for personal injuries, in which this appeal is taken, was instituted in June, 1906, and was not tried in the circuit court until June, 1908. His separate suit for injuries to his horse and buggy was instituted by him in May, 1907, and judgment in the sum of $50 for the damages to this property was rendered in January, 1908. This judgment for $50 had been settled by the railroad company when the suit for appellant's personal injuries was tried in the court below. We do not think that appellant should legally be limited to one suit for settlement of these two separate demands, even though the claims arise from the same tortious act.

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Brief for appellant.

The case of *Brunsden v. Humphrey,* L. R. 14, Q. B. D. 141, seems to have been the first case upon this proposition of law arising in England. It was an action for damages to plaintiff's person sustained in a collision of defendant's cabriolet with that of the plaintiff, who had previously brought suit and recovered damages for injuries to his cabriolet growing out of the same occurrence. The majority of the Queen's Bench held that damage to goods and injury to the person, although occasioned by one and the same wrongful act, are infringements of different rights and give rise to distinct causes of action; and thereby recovery in an action of compensation for the damages to the goods is no bar to an action subsequently commenced for the injury to the person. There was a dissenting opinion by Lord Chief Justice COLERIDGE, and several of our state courts have adopted this dissenting opinion of Lord COLERIDGE as the law.

It will be found that all of the authorities holding that but one suit can be brought under such circumstances rely, for their precedent, on this dissenting opinion of Lord COLERIDGE.

The case of *Wilson v. Texas, etc., Railroad Co.,* 8 Tex. Civ. App. 144, 27 S. W. 924, is a case on all fours with the instant case. There Watson was personally injured in the same railroad wreck which injured some of his mules. Watson first recovered judgment for the mules, and then sued for damages for his personal injuries. The defendant pleaded the former recovery for the mules as being a bar to recovery for the plaintiff's personal injuries. The court in that case held that recovery for damages to the mules did not preclude subsequent recovery for damages because of Watson's own personal injuries.

The case of *Reilly v. Sicilian Asphalt, etc., Co.,* 11 Am. Neg. Rep. 328, 170 N. Y. 40, is also precisely in point here. It is a decision of the highest court of New York, the opinion being by ALTON B. PARKER, J. Reilly and his vehicle each sustained injuries in consequence of a collision with a gravel pile placed in the road through the negligence of the defendant. Reilly

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brought an action against the defendant in the court of common pleas to recover damages for the injury to his person. Subsequently, as in the case at bar, he brought an action in one of the district courts of the city of New York to recover for the injury to his vehicle; and in the latter action, just as here, he recovered judgment which was paid by the defendant. Defendant then set up by supplemental answer the judgment in the district court suit and its satisfaction as a bar to the further maintenance of the action in the court of common pleas. The court of common pleas held that recovery for injuries to the vehicle was a bar to the maintenance of the suit for personal injuries, on the theory that where injuries to the person and his property grew out of the same transaction, recovery as to the one bars maintenance of suit as to the other. The case was then appealed to the supreme court of New York. *Reilly v. Sicilian Asphalt, etc., Co.*, 31 App. Div. N. Y. 302, 4 Am. Neg. Rep. 692), which court sustained and affirmed the judgment of the court of common pleas below. From the supreme court of New York the case then went by appeal to the court of appeals of New York, the court of last resort in that state, which latter court, through an exhaustive opinion, reversed the judgment of the lower courts and held that it was proper for two suits to be brought under the circumstances.

The reasons why two actions, under circumstances such as here, should be allowed to be brought, are many. The rules of evidence and law governing the damages in the two classes of cases are altogether different. An existing claim for personal injuries would not be required to be listed in bankruptcy in case the injured person should be placed in bankruptcy. The injured person in a personal injury suit is permitted to recover for mental suffering and for physical suffering and for permanent injury, if existing, together with compensation for loss of service. Had Kimball been killed on the occasion of his injury, the cause of action for his death would, under our statute law, have been barred after one year from date of death. But

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Brief for appellee.

the right to his legal representatives to sue for injury to his mule or buggy would exist for six years after date of injury. The measure of damages to property is the difference between the value immediately before the injury and value immediately afterward. If it were the rule that but one suit could be brought by appellant for both injuries, it can readily be seen how a number of complications could arise and the rights of parties be materially interfered with. *Murphy v. American Soda Co.*, 86 Miss. 791, 39 South. 100; *Eagan v. New York Transportation Co.*, 78 N. Y. 209, 39 Misc. Rep. 111; *Mobile, etc., R. R. Co. v. Matthews*, 91 S. W. 194.

It is true that in *King v. Chicago, etc., R. Co.*, 80 Minn. 83, 50 L. R. A. 161, cited by appellee, a contrary rule to the foregoing is announced. We do not think that the case last cited is, however, a well-considered case, and call the attention of the court to the fact that it gives as authority the *Reilly case* from New York, above set forth.

George L. Smith and *H. T. Smith*, for appellee.

The great weight of authority, as well as of reason, is opposed to the allowance of two recoveries for the same wrongful act. Those authorities which permit two separate suits for the same tort, one for the recovery of damages done to the property, and the other for the recovery of damages done to the person rest upon the case of *Brunsden v. Humphrey*, 14 Queen's Bench Division, 141, which is the only authority where a discussion of the question upon principle has resulted in such a holding.

Mr. Black, in his work on Judgments, second volume, § 740, accepts the authority of *Brunsden v. Humphrey* without question, and, apparently, without thought. The civil court of appeals of Texas, in the case of *Watson v. Texas Railway Company*, 8 Texas Civil App. 144, 27 S. W. 924, in turn accepts the authority of Black on Judgments without further investigation or discussion. These are the only authorities supporting the appellant's position of which we are aware, except the case

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of *Reilly v. Sicilian Asphalt, etc., Co.*, 88 Am. St. Rep. 639, which rests upon the statutory law of New York, though it too cites the case of *Brunsden v. Humphrey*. Thus it appears that all of the authorities, upon which the appellant can reply, rest either upon the case of *Brunsden v. Humphrey* or upon the statutes of New York. Turning to the English case, we find that the opinion of the court was concurred in by BRETT, M. R. and BOWEN, L. J., but that Lord Chief Justice COLERIDGE dissented from the decision in an opinion which seems to us to be unanswerable. The opinion of the majority of the court is made to rest entirely upon the hair-splitting distinction as to whether a cause of action consists of the wrongful act, or of the damage accruing therefrom, the majority of the court taking the view that it is the damage and not the act done, that constitutes a cause of action, which idea is made to rest entirely upon the fact that a wrongful act without injury does not afford a cause of action. While it is quite true that a wrongful act without injury does not afford a cause of action, this is not because the wrongful act does not constitute a tort, but only because it would be practically impossible for any government to furnish sufficient machinery to settle all of the quarrels that might arise between mankind if it undertook to investigate every wrong where no injury was suffered. On the other hand, while wrong without injury does not support a recovery, because the state cannot furnish courts enough to settle all abstract questions of right that may arise, injury without wrong, on the other hand, affords no cause of action, because there is nothing of which to complain, or, in other words, because no right has been infringed.

We quote the following from the dissenting opinion of Chief Justice COLERIDGE: "It appears to me that whether the negligence of the servant, or the impact of vehicle which the servant drove, be the technical cause of action, equally the cause is one and the same; that the injury done to the plaintiff is injury done to him at one and the same moment, by one and the

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Brief for appellee.

same act, in respect to different rights, i. e., his person and his goods, I do not in the least deny; but it seems to me a sublety not warranted by law to hold that a man cannot bring two actions if he is injured in his arm and his leg but can bring two if besides his arm and leg being injured his trousers, which contained his leg, and the coat sleeve which contained his arm, have been torn. The consequences of holding this are so serious, and may be very probably so oppressive that I, at least, must respectfully dissent from a judgment which establishes it. I think that the court below was right, and that this appeal should be dismissed."

It is to be observed, that in both the English case and the New York case, the view taken by the trial court, accorded with that expressed by Chief Justice COLERIDGE, and, as we have already observed, every authority which we have seen, which accepted the view of the majority of the court in *Brunsden v. Humphrey,* except that the court of appeals of New York, simply followed the English court without examining the question upon its merits.

Turning to the New York case of *Reilly v. Sicilian Asphalt, etc., Co.,* 88 Am. St. Rep. 639, it is perfectly manifest that this decision was controlled by the local statute. It is pointed out in this opinion that the statute of limitations as to wrongs to persons and as to wrongs to property was at variance, but this constituted no real obstruction, as there are many cases in which a part of the damages may be barred by the statute of limitations, while a part is not barred by the statute of limitations. Nor is there such a difference in the statute of Mississippi. We are confronted with this difficulty, however, every day in suits upon accounts, and in the settlement of partnerships, and in complaints against trustees, and in many other matters, and we have never heard this alleged as a ground for permitting one to split his cause of action. His remedy is simple, let the plaintiff sue in time to avoid both statutes. It is also suggested that one character of damages was assignable, while

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the other was not. This presents no real difficulty. Even where the entire account is assignable, and a portion of it only is assigned, the plaintiff loses the balance, since he cannot split his cause of action. There is no greater hardship in insisting that the plaintiff shall bring suit for his entire demand before assignment, where a part of the claim is assignable and a part is not assignable, than there is in insisting that he shall bring a suit upon the whole demand without assigning a part thereof, where it is all assignable. A reading of the opinion of the court of appeals of New York, and a little consideration of the matter will make it manifest that the court of appeals of New York found the law of that state complicated by its code procedure. The statute law of New York undertook to classify the different causes of action, and it did so by placing injuries to *personal property* in one category, and injuries to *persons* in another category, and then proceeded to declare that it was not permissible to join actions for injuries to one class with actions for injuries to the other class. It is manifest that there was but one way to accomplish anything approximating justice under such statute law, and that was by allowing two separate action, and this had to be justified, no matter how fine it was necessary to spin the argument.

The common law of this country is contrary, contrary to the statute law of New York, as nothing could be better understood or settled than that the judgment of a court precludes not only that which was litigated, but everything that might have been litigated in the case. Herman on Estoppel, 1416; *Tankersley v. Pettis,* 71 Ala. 186.

It was conceded by both BOWEN, L. J., and by the court of appeals of New York that a claim for personal injuries might have been joined with the claim for damages to the horse and vehicle, and it seems to us that the state, as well as the parties, has an interest in the establishment and maintenance of the principle which forbids the maintenance of more than one suit for the same wrongful act. Certainly it would be against public

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policy to permit a person who has suffered a wrong to put the state to the expense of the trial of two causes when one would suffice.

The courts have held that two causes might have been maintained for the same wrongful act, have taken no account whatever of the difficulties arising in regard to the award of punitive damages, and there is simply no answer to the proposition that it would be impossible to prevent the double punishment for the same wrong by the award of punitive damages in both cases, if two causes may be maintained for the same wrongful act.

It is not the injury which a man receives that constitutes a cause of action, but the act done which causes the injury.

Turning to the authorities which support the insistance of the appellee, to the effect that the plaintiff can recover only once for damages done by the collision,—in other words, that the damages both to the vehicle and to the person having been caused by the same blow, were recoverable in the same cause of action, and that recovery could not be split so as to support two separate and distinct recoveries,—we find that the general principle is thoroughly established both in Mississippi and elsewhere. *Yazoo & M. V. R. Co. v. Payne* (Miss.), 45 South. 705; *Hazzard Powder Co. v. Bolger,* 18 Pac. 636; *Baird v. United States,* 96 U. S. 430.

The precise question has, however, been frequently decided, and upon reasoning which we deem conclusive. In the case of *King v. Chicago, etc., R. R. Co.,* 82 N. W., page 1113, the supreme court of Minnesota, after reviewing all of the authorities to the contrary said: "We are of the opinion that the cause of the action consists of the negligent act which produced the effect, rather than in the effect of the act in its application to different primary rights, and that the injury to the person and property as a result of the original cause gives rise to different items of damage. The natural rights mentioned in the constitution and statutes are of personal character, all centering in

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the person; and the enactments referred to are intended to preserve them under the various phases of life, in the most practicable manner, as viewed by the legislature. But, because the distinction in reference to personal and property rights has been made, as noticed by respondent, it does not follow that those statutes were intended to definitely provide for separate remedies under the circumstances presented in this cause." Speaking of the case of *Brunsden v. Humphrey,* the supreme court of Minnesota, in the case *supra,* said: "But the refined reasoning of this part of the opinion is destroyed by the common-sense, practical argument of Chief Justice COLERIDGE, in a dissenting opinion."

See also *Doran v. Cohen,* 147 Mass. 342, 17 N. E. 648; *Knowles v. Railroad Co.,* 147 Mass. 606, 18 N. E. 580; *Sullivan v. Baxter,* 150 Mass. 261, 22 N. E. 895; *McCaffrey v. Carter,* 125 Mass. 330; *Folsom v. Clemence,* 119 Mass. 473; *Goodrich v. Yale,* 8 Allen, 454; *Trask v. Railroad Co.,* 2 Allen, 331; *Bennett v. Hood,* 1 Allen, 147; *Wheeler v. Tracer* (Mo.) 42 S. W. 946; all of which cases in effect sustain the decision, in the present case, of the court below.

MAYES, J., delivered the opinion of the court.

In October, 1906, while attempting to drive across the track of the railway at a public crossing in the city of Biloxi, Kimball claims to have been injured. For this injury he brought suit against the defendant company. On the trial it appeared that Kimball had sued for and recovered a judgment against the railroad company for damage done a horse and wagon by the same wrongful act. This judgment had been fully satisfied. This suit is to recover damages for injuries sustained to his person in the same collision which damaged the horse and wagon. Pleas presenting this issue were filed by the railroad company, and the question of the former recovery in a suit for injury done his property by the same act being beyond dispute, the court gave a peremptory instruction to find

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Opinion of the court.

for the defendant. From this action of the court an appeal is prosecuted.

In the case of *Scott v. Southern Railway,* 47 South. 531, in which no written opinion was delivered, this question was presented, and the court held that, where a person sustained injuries both to himself and his property by the same tortious act, it gave rise to but a single cause of action. There seems to be much conflict of authority on this subject, but the weight of better authority is in keeping with the holding of this court. The case of *King v. Chicago, M. & St. P. R. Co.,* 80 Minn. 83, 82 N. W. 1113, 50 L. R. A. 161, 81 Am. St. Rep. 238, is a very instructive case on this subject, and in the opinion and notes will be found a collation of many authorities. In the *King case,* above referred to, in discussing the question of whether or not, where one is injured both in his person and property by the same tortious act, it constitutes more than one cause of action, the court held that the different injuries constituted separate items of damage, but only gave rise to one cause of action, and further held that in such a case "that rule of construction should be adopted which will most speedily and economically bring litigation to an end, if at the same time it conserves the ends of justice. There is nothing to be gained in splitting up the rights of an injured party as in this case, and much may be saved if one action is made to cover the subject." We quote the above language with unqualified approval as applied to this case.

Affirmed.

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Brief for appellant.

LEE BENNETT ET AL. v. ELLA DEMPSEY.

[48 South. 901.]

1. HOMESTEAD. *Abandonment. Conditional intent to return.*

Where a debtor ceased to reside upon his homestead and acquired a new one, he cannot claim the abandoned premises as exempt from execution, although he has not paid for the new one and constantly intended and still intends to return to the old in case he shall be unable to pay for the new.

2. SAME. *Mortgage.*

A mortgage on his homestead, diminishing the value of the mortgagor's interest in the property, does not enlarge the area or value of the land which he may claim as exempt.

3. SAME. SAME. *Disposal. Code* 1906, § 2158.

The giving of a mortgage on a homestead is not a disposal thereof, within Code 1906, § 2158, providing that where an owner disposes of exempt property it shall not thereby become liable to his debts.

FROM the chancery court of Winston county.

HON. JAMES MCCOOL, Chancellor.

Mrs. Dempsey, appellee, was complainant in the court below, and Bennett and others, comprising the partnership of Bennett Brothers & McMillin, appellants, were defendant there. From a decree in favor of complainant, enjoining defendants from selling under execution land claimed by appellee, Mrs. Dempsey, as a homestead, they appealed to the supreme court.

The opinion of the court states the facts.

L. H. Hopkins, for appellants.

The motion of appellants to dissolve the injunction should have been sustained. Homestead rights are to be protected according to law, but they should not be perverted into instrument of fraud. *Rutherford v. Jamison,* 65 Miss. 219.

This is not a suit to subject a homestead or the proceeds

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Brief for appellee.

thereof to the payment of debts. The mortgage executed to the Merchants & Farmers' Bank of Louisville for $1,320 could not be disturbed by a sale under the writ of execution and levy in this case, hence Code 1906, § 2139, can have no bearing. Nor can the case of *Fitzgerald v. Rees,* 67 Miss. 463, because the two tracts of land did not join but are separated by a distance of not less than a quarter of a mile.

Code 1906, § 2157, governs this case. It provides that when an exemptionist ceases to reside on a homestead it becomes liable for his debts unless the removal be temporary by reason of casuality or necessity, and with the purpose of speedily re-occupying it as soon as the cause of separation is removed. *Thompson v. Tillotson,* 56 Miss. 36; *Moore v. Bradford,* 70 Miss. 70.

It can make no difference that the interest of appellee in the two places, after the payment of the mortgages, will amount to less than the homestead value allowed by the statute. Nor does the fact that there is a mortgage on the land, as cutting down the value of the same, debar a creditor's sale of land that would be liable if there were no mortgage.

The judgment of the justice of the peace was taken by default after personal service, and the evidence shows that the account sued on was partly appellee's individual debt, and that she agreed to pay the account due by her deceased husband. The question as to whether or not appellee owed the amount claimed by appellants will not be considered by this court in as much as appellee was regularly served with summons, but failed to make any sort of defense and allowed judgment to be taken against her for the full amount sued for. *Jones v. Coker,* 53 Miss. 195.

Rogers & Bantley, for appellee.

The appellee testified that the purchase money of the Riley place had not been paid, and that it was not her property until paid for; and that her homestead was the old Dempsey place where her husband died. She is still using the Dempsey place,

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and has a legal right to it as her homestead although she occupies the Riley place. This court has held in the case of *Zukoski v. McIntyre,* 93 Miss. 806, 47 South. 435, that the homestead right is favored by law, and where there is any doubt whether the property is a homestead it should be settled in favor of the exemptionist.

Code 1900, § 2146, exempts from execution or attachment a homestead to the value of $3,000. We contend that this amount of $3,000 is to be freed from all purchase money due on the property. If we take the indebtedness of $2,200 due on both places, and hold that the values of the Dempsey homestead and the Riley property are together $3,500, the homestead interest of appellee will be only $1,300, when under the law she is entitled to $3,000 exemption. It would indeed be a cruel rule to subject a homestead to a sheriff's sale simply because the owner had borrowed money thereon in order to buy other property which she had not fully paid for; especially when such owner still claims the homestead under the statute.

In *Filzgerald v. Rees,* 67 Miss. 473, 6 South. 736, this question is discussed fully, and we refer the court to this decision as settling this case. See also *Thomas v. Thomas,* 45 Miss. 263; *Pennington v. Seal,* 49 Miss. 518.

MAYES, J., delivered the opinion of the court.

On the 31st day of December, 1906, Mrs. Ella Dempsey owned and occupied as a homestead the following described lands, towit: The E. 1-2 of N. W. 1-4, less 11 acres off the west side; the exact description of the land being set out in full in the bill filed herein. The above land lies just outside of the corporate limits of the town of Louisville, in Winston county. Mrs. Dempsey continued to own and occupy the above premises as a homestead until in the early part of 1908, when she purchased another place from one Riley; this latter place being about a quarter of a mile from the former, and being located in

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the town of Louisville. The testimony shows that the Riley place cost her $1,680, and that the other place, outside of the corporate limits, and from which she moved, was of the value of about $2,000. There is no dispute as to the fact that early in 1908, when Mrs. Dempsey purchased the Riley place, she abandoned her former home, and moved into the Riley place, and commenced conducting a boarding house. She says that, if she fails to pay all that she now owes on the Riley place, she expects to move back on the place outside of the corporation, and claims that place as her homestead, and not the Riley place, in the event she fails to pay for the latter. In order to pay for the Riley place, she executed a mortgage on her then homestead to a bank of Louisville, and borrowed $1,320, which, after paying some other debts on the place, she used to make a partial payment on the Riley place, falling short about $880, which latter sum she borrowed from one McMillin. Now, at the time of the institution of this suit, Mrs. Dempsey was living at the Riley place, having abandoned her former home to take up her abode there, and she had a mortgage on both places, aggregating the sum of $2,200. Some time in May, 1908, and while Mrs. Dempsey was living at the Riley place, Bennett Bros. & McMillin, appellants, had an execution levied on the abondoned homestead for the purpose of satisfying a judgment that they had recovered against her in February, 1908, aggregating the sum of $158.78. After the levy of the execution Mrs. Dempsey enjoined the sale thereunder on the idea that the property was exempt, and the theory of the injunction seems to be that, because the net interest that Mrs. Dempsey has in the two properties, after paying off the mortgages, is less than the value of a homestead exemption, and because it is her intention to sell her former homestead and apply the proceeds of same to the payment of the debts due on both places, that therefore the abandoned homestead is not liable to creditors. The two places are separate and distinct, situated over a quarter of a mile apart,

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and the aggregate value of the two places is proven to be $3,500. The court below sustained the injunction, making it perpetual, from which an appeal is prosecuted here.

There can be no doubt but that Mrs. Dempsey has abandoned the place lived on, and has established her home on the Riley place, in the town of Louisville, and her former home is therefore liable to the payment of her debts. Section 2146 of the Code of 1906 only exempts the land and buildings owned and occupied as a residence, and when occupation ceases the property, if still owned by the debtor, becomes liable to the creditor for the payment of debts. Section 2157, Code 1906, makes the homestead liable to debts whenever the debtor "shall cease to reside on his homestead," unless the removal be temporary, by reason of some casualty or necessity, and with the purpose of speedily reoccupying same, etc. Mrs. Dempsey's own testimony makes out a clear case of abandonment within the meaning of the statute. She has no purpose to return unless, as she says, she fails to pay for the Riley place. The court cannot presume this contingency will happen, and Mrs. Dempsey has no intention of returning unless it does. Her removal to the Riley place is permanent, in so far as she is able to make it so. The fact that she intends to sell her former place to pay for the Riley place does not alter the situation under the facts of this case. One can only hold as exempt the land and buildings owned and occupied as homestead, and occupation is one of the essentials necessary to a successful claim of exemption, except as modified by section 2157, and Mrs. Dempsey does not bring herself within that exception.

Neither can it make any difference that her net interest in the two places, after the payment of the mortgages, amounts to less than the homestead value allowed by the statute. The law only exempts one homestead. That homestead may be of the value of $3,000, or less than that value; but, if it be less than $3,000 in value, this does not warrant the debtor in claiming another tract of land, remote from the homestead and in no way used in

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connection therewith, as exempt in order to make up the value of the homestead. The statute does not exempt lands of the value of $3,000 to a debtor, situated anywhere; but it exempts lands, etc., occupied as a residence, this land so occupied not to exceed in quantity one hundred and sixty acres, or in value the sum of $3,000, where the homestead claimed is in the country, as is the case here.

Nor does the fact that there is a mortgage on the land, thus cutting down the net value of same, authorize the claiming of a greater quantity of land than could be claimed if there were no mortgage. Section 2158 provides that, where the property exempted is disposed of by the owner, it shall not thereby become liable to the debts of the owner; but the giving of a mortgage on the exempt property is in no sense a disposal of the property within the meaning of the section. To dispose of the property, within the meaning of this section, is to part with all title thereto. There having been no sale of the property, and there being no attempt to subject the proceeds of the sale of the property to the creditors' debts, paragraph "b" of the tenth clause of section 2139 has no application.

There is a question raised as to whether or not Mrs. Dempsey owed the amounts claimed by Bennett Bros. & McMillin; but we deem it unimportant to discuss this feature of the case, since she was regularly served with summons and notified of the suit, but failed to make any sort of defense, and permitted judgment to be taken against her for the full amount sued for. The judgment concludes her from any collateral attack on same.

Reversed and remanded.

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MISSISSIPPI,

AT THE

MARCH TERM, 1909.

JAY W. COOPER ET AL. v. MOBILE, JACKSON & KANSAS CITY RAILROAD COMPANY.

[48 South. 832.]

RAILROADS. *Stations. Change of route. Location of depots.*

A railroad company having constructed a depot building on a new line through a municipality, cannot, after being perpetually enjoined from abandoning its old route, be restrained from moving the depot to the old route, although the location of a depot was not directly involved in the former litigation.

FROM the chancery court of Pontotoc county.

HON. JOHN Q. ROBINS, Chancellor.

Cooper and others, appellants, were complainants in the court below and the railroad company, appellee, was defendant there. From a decree in favor of defendant the complainants appealed to the supreme court.

The opinion of the court states the facts.

C. Lee Crum, for appellants.

The order of the chancery court in *State v. Railroad Co.,* 86 Miss. 172, 38 South. 732, referred to as exhibit to the answer in this present suit, does not require the appellee to remove the

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depot, and if the order of the Mississippi Railroad Commission, referred to as exhibit to appellee's answer, does not require the removal of the depot, then it must be conceded in appellee's answer in this case, that it had no right to make such removal inasmuch as it has claimed the right upon no other grounds. The depot in question is located upon the main line of appellee's railroad and within the corporate limits of the town of Pontotoc. The case relied on by appellee, *State v. Railroad Co., supra,* was appealed in order that the principles of the case might be settled, and TRULY, J., in delivering the opinion of this case, strongly intimates that the appellee, in constructing the line of its road on which this depot is situated, exceeded its charter rights and authority. On such appeal the case of *Lusby v. Railroad Co.,* 73 Miss. 360, was relied upon as authority for this intimation. But on the second appeal of the case, *Railroad Co. v. State,* 89 Miss. 724, 41 South. 295, WHITFIELD, C. J., who delivered the opinion on such second appeal, held that the *Lusby case, supra,* did not apply. This later decision is clearly correct, because in the *Lusby case* the court held that the charter of the Kansas City, etc., Railroad Company, the company's only authority for the changing of its line of road as then located, does not authorize such a change, and that the railroad company has no such implied power, there being no insurmountable obstacle to require it. Under Code of 1892, § 3580, in ch. 112, appellee had authority to change its line of road. It follows, then, that the appellee had full authority under its charter to construct the line of road upon which is located the depot in question, and it had the authority under its charter rights to build the depot at the place where it is located, provided such place is reasonably convenient and accessible to the railroad company and to the public. The bill of appellants alleges such to be the case and the answer of the appellee admits it.

In *Railroad Company v. State,* 89 Miss. 724, 41 South. 259, relied upon by appellee, this court held that the present appellee should broaden and standardize the old line of its road because

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it had agreed to do so as a condition of the consolidation of the two roads. The question of the location of a depot in the town of Pontotoc was not involved in the decision of the case cited.

A contract with individuals to locate and maintain a depot at a certain place cannot be enforced where it is against the public interest to do so. *Railroad Company v. Crandall,* 112 Am. St. Rep. 42. But where the railroad company has located its depot in a proper place, it cannot remove or relocate it elsewhere to the injury of individuals owning property near it, unless the interests of the public and of the railroad company demand the relocation. *Railroad Company v. People,* 22 Atl. 560. See also *State v. Railroad Company,* 68 Miss. 653, 9 South. 469; *People v. Railroad Company,* 120 Ill. 48; *Railroad Co. v. Molloy,* 64 Tex. 607; Code 1906, § 4863.

Code 1892, § 4309, is the only pretended authority found in our statute law for the action of the Mississippi railroad commission in this case. The Code of 1906, § 4863, provides that "Where the site selected by the railroad officials for depot buildings, or station houses, erected or to be erected, is inconvenient or inaccessible, the company must order the erection of a new building or station house and designate its site or location; but every depot must be located with regard to the interest of the railroad company and the public convenience." This section of the Code of 1906 is a re-enactment of the Code of 1892, § 4309. It will be noted, however, that Code 1892, § 4309, does not authorize the commission to act after the depot has been erected. If it be argued that the railroad commission had authority to act when it did because the appellee had begun, or was contemplating, building a depot on the site of the present depot, the answer to such argument is that it is admitted in the pleadings, that the place of the present location is more convenient and accessible for the railroad company and for the public than is any other place within the town of Pontotoc. *State v. Railroad Company,* 68 Miss. 653, 9 South. 469; *State v. Railroad Company,* 87 Miss. 679, 40 South. 263. The court below,

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Brief for appellee.

if it had followed the rule of law that should control in courts of equity, should have decided that a state of acts does not exist sufficient to give the Mississippi Railroad Commission jurisdiction of the subject matter. *State v. Railroad Company,* 87 Miss. 686.

Flowers & Whitfield, for appellee.

This cause has been in the supreme court twice. See *State v. Railroad Co.,* 86 Miss. 172, 38 South. 732 and *Railroad Co. v. State,* 89 Miss. 724, 41 South. 259. After the decision of the supreme court on the second appeal the case was carried by writ of error to the supreme court of United States and the decision of the supreme court of Mississippi was up-held throughout.

In the opinion of this court in *State v. Railroad Co.,* 86 Miss. 172, this court held that "it is the duty of the appellee to maintain, use, broaden and standardize the narrow-gauge road formerly belonging to the Gulf & Chicago Railroad Company so that it shall become a part of the line of railroad operated by the consolidated corporation." This holding located the line through the town of Pontotoc. It was necessary that the road should run along the old narrow-guage line to the old depot site. The learned chancellor of the court below had denied the injunction asked for by the Mississippi Railroad Commission, and upon the first appeal this court reversed the decree of the chancellor and remanded the cause. Further testimony was taken, and the matter was again heard before the chancellor who, following the opinion of the supreme court, sustained the contention of the state railroad commission, and his finding was affirmed by this court on the subsequent and second appeal. *Railroad Co. v. State,* 89 Miss. 724.

While this court in the former litigation did not deal with the question of the location of the depot, yet it there decided the questions which control the present appeal. It will be remembered that after the litigation above referred to, was ended by the decision of the supreme court, there was nothing

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Brief for appellee.

left for the railroad companies to do but build their line by the old depot site. The courts had finally held that all of the old narrow-guage line down to the old depot site must be made a part of the main line extending through the town of Pontotoc, "through the western part" of the said town. The companies found that the money expended in the construction of that line was thrown away; that they must rebuild along that part of the old narrow-guage line which had been abandoned. As we have already stated, the Federal court case which was filed for the purpose of preventing the enforcement of the order made by the Railroad Commission in January, 1904, was not prosecuted pending the final decision in this other branch of the litigation. After the Railroad Commission lost on their contention that the companies did not have to build down to the old depot site, the present appellee considered that the depot question was settled in so far as the line built through the western part of the town was involved. The depot of the company must be on its line. The courts had held that the line must run by the old site. The company could not then maintain a depot on the other line which was held by the courts to have been constructed without authority of law.

The line constructed through the western part of the town is still there and still being used by consent of the Railroad Commission. This leniency was extended by agreement because it was recognized that the road was new and the company was struggling to continue in actual operation. The decree of the court, however, was recognized by the company as being final, and it is only a matter of time when the change will be made. The Railroad Commission will insist upon the completion of the line southward from the old depot site as soon as it is convinced that the company can raise the money with which to complete it to the point where it will connect with the line as now constructed. The present appellee has complied with the decree in so far as it requires the old narrow-guage line to be completed

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Brief for appellee.

for use down to the old depot site and is running its trains down to the said point.

The court will bear in mind that the order of the Railroad Commission, passed in January, 1904, is still in force; that the enforcement of it is not restrained by any injunction writ. This order was simply held in abeyance pending the determination of the question involved in the said other litigation. Soon after the final decision of the supreme court of the United States, the railroad company began to take steps to comply with the decree. Since the courts had held that the law had been violated by the construction of the line through the western part of the town and that the said line should be constructed by the old depot site, the line was at once completed down to the old site and has since been used. When the appellee, obeying the decision of the court, began to make preparation to remove the depot building from the western part of the town in order to place it on the line which the courts had located and on the selected spot by the Commission as a new depot site, appellants who owned property near the depot site in the western part of the town asked for an injunction against the removal.

Furthermore, the Mississippi Railroad Commission at the instance of the attorney-general of the state, himself a citizen of Pontotoc, asked an order requiring the appellee to abandon the depot which had been constructed in the western part of the town and to remove it to the main line and to the old site of the original depot in the town. It appeared that the appellee was acting (1) under the decree of the chancery court of Pontotoc county which had been affirmed by the supreme court of the United States fixing a location on its main line; and (2) under the order of the State Railroad Commission, passed in January, 1904, requiring the replacing of the depot on the old site in the town; and (3) under the order of the Mississippi Railroad Commission rendered on June 17, 1908, requiring the appellee to abandon the depot built in the western part of the town, and to remove and relocate it on the original depot site.

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Opinion of the court.

The appellee formerly preferred the site for which appellants are now contending, but the State Railroad Commission and the courts decided the matter against appellee. Appellee resisted, as long as it might, the efforts of the people of Pontotoc and of the Railroad Commission to compel it to build its line through the town of Pontotoc along the old site and to erect its depot on the original site. And now at this late time, after all the decisions aforesaid, when it undertakes to obey the law and comply with the order of the railroad commission it is met by the efforts of the present appellants to prevent it.

Appellants cannot legally contend that two depots should be maintained in Pontotoc, nor that appellee should maintain a depot three-quarters of a mile from its main line. The rights of the appellants must be exerted, if at all, through the Mississippi Railroad Commission which body has exclusive authority over such matters. Yet appellants are not only ignoring the necessity of applying to the State Railroad Commission for relief, but they are setting themselves up against the State Railroad Commission and attempting in court to prevent appellee from obeying the valid orders of the Commission. The orders of the Railroad Commission, fixing the location of the depot, are not assailed except indirectly and collaterally. The Railroad Commission is not even a party in this cause.

BRAME,* Special Judge, delivered the opinion of the court.

This is an appeal from a decree dissolving an injunction and dismissing a bill, which bill was filed in the court below July 20, 1908, by appellants to enjoin appellee, the Mobile, Jackson & Kansas City Railroad Company, from removing its depot from the present site in the western part of the town of Pontotoc to what is known as the old site near the center of the town, and where the old depot of the Gulf & Chicago Railroad Company

* FLETCHER, J., having been of counsel in this case before his appointment to the bench, recused himself and L. BRAME, ESQ., a member of the supreme court bar, was appointed and acted in his place.

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was before it was destroyed by fire. The history of the case is substantially as follows:

The appellee operates a railroad from Mobile, Ala., to Middleton, Tenn., which railroad traverses Pontotoc and other counties in the state of Mississippi. That part of the line extending from a point near Decatur, Miss., to Middleton, Tenn., is owned by the Gulf & Chicago Railroad Company, and was leased by the appellee about the year 1903. The Gulf & Chicago Railroad Company had built a narrow-guage railroad from Middleton, Tenn., down to the town of Pontotoc, and this had been operated as a narrow-guage road some time prior to the lease. In the year 1903, the Gulf & Chicago Railroad Company, with a Tennessee corporation of the same name, presented a petition to the Mississippi Railroad Commission asking leave to consolidate under the name of the Gulf & Chicago Railroad Company, and agreeing to widen and standardize the narrow-gauge road from Middleton, Tenn., to the southern terminus near Decatur. It seems that there was some controversy as to whether the petitioners obligated themselves to broaden and standardize the narrow-guage line throughout this entire length; but in the litigation hereinafter referred to this court upheld the contention of the Railroad Commission that there was such an obligation. When the narrow-guage road was being operated from Middleton to Pontotoc, the southern terminus was at the depot in the town of Pontotoc, and in a valley. After the Railroad Commission had given its consent to the consolidation, and about the time of the above-mentioned lease, work was begun to standardize the line and extend it southward from Pontotoc. The railroad company decided that it would be cheaper an better to change the location of the line at the town of Pontotoc, and instead of extending it south from the old depot, to diverge to the westward, about a mile and a half north of Pontotoc, and run the line through the western part of the town. The purpose of the railroad company was thus to abandon a part of the old narrow-guage road, and it was claimed that this was not a vio-

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lation of the agreement made with the Railroad Commission at the time it gave its consent to the consolidation. Thereupon the deflection was made, and the railroad was built around on the hills and through the western part of the town of Pontotoc, as the corporation limits had then been extended. Meantime the old depot building at the southern terminus of the narrow-guage line in the town of Pontotoc had been destroyed by fire, and the question arose as to building another depot.

About this time a petition of citizens was presented to the Railroad Commission to require the railroad company to rebuild the depot on the old site, and a counter petition opposing this was also filed; it being the desire of the counter petitioners and the railroad company at the time to have the depot at a point on the diverted line about three-quarters of a mile west of the site of the old depot. On January 12, 1904, the petition and counter petition came on to be heard before the Railroad Commission, which had visited the town of Pontotoc and examined the two proposed sites, when the following action was taken by the commission: "Ordered, that the Gulf & Chicago Railroad Company, leased by the Mobile, Jackson & Kansas City Railroad Company, erect a freight and passenger depot of sufficient size and dimensions to transact the business of the said town of Pontotoc, on the old site or on the grounds now occupied by them as a temporary depot; that said work be commenced not later than the 20th day of January, 1904, and completed within 90 days from said date, on or about April 20, 1904." The railroad company did not desire to obey this order, and thereupon shortly afterwards it filed its bill in the United States circuit court for the Southern District of Mississippi, seeking to enjoin the commission from enforcing the order. A preliminary injunction was granted, and while this was pending negotiations were had by the railroad company with certain citizens of Pontotoc, who desired to have the depot located on the new site, and accordingly it was determined to build it there and it was so built, and stands there to this day.

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Opinion of the court.

It appears from the record that the railroad company believed that the courts would finally decide that it was proper to locate the depot upon this new site. The road having been diverted and built through the western part of the town, and a small portion of the old line having thus been abandoned, on August 3, 1904, the state of Mississippi and the Railroad Commission joined in a bill in the chancery court of Pontotoc county, against the railroad company and its lessor, seeking to enjoin the defendants from abandoning that part of the line extending from the point of deflection on the north down to the old depot site in the town of Pontotoc, and a preliminary injunction was granted. The order of the Railroad Commission above mentioned was not directly involved in this litigation, but the location of the line of railroad through the town was involved; for if the old line was to be followed, unless there should be two depots, the location of the depot site was indirectly involved. A motion was made by the defendants to dissolve this injunction, which motion was sustained, and the complainants appealed to this court, and upon full consideration the decree was reversed, and the injunction was reinstated, and the cause was remanded. For a full report of this case, see *State v. Railroad Co.*, 86 Miss. 172, 38 South. 732, 122 Am. St. Rep. 277. The cause, being remanded, was again heard in the chancery court of Pontotoc county, and on March 10, 1906, a decree was rendered in favor of complainants, making perpetual the injunction which had been granted to prevent the abandonment by the railroad company of the old line. By its decree the court found as a fact that the citizens of the town of Pontotoc had never given their consent to the change of the depot from the old site to the new. From this decree the defendants prosecuted an appeal to this court at the November term, 1906, and the case was again considered by this court, and the decree was affirmed. See *Railroad Co. v. State*, 89 Miss. 724, 41 South. 259, 122 Am. St. Rep. 295. In delivering the opinion on that appeal, this court expressly stated that the location of the depot was not considered,

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but it was held that the old line had to be followed. The railroad company, still being unwilling to follow the old line, or to construct a depot on the old site, took the case to the supreme court of the United States, which on May 18, 1908, rendered a decision affirming in every respect the decision of this court. 210 U. S. 187, 28 Sup. Ct. 650, 52 L. Ed. 1016.

After the final decision by the supreme court of the United States, on June 15, 1908, Hon. R. V. Fletcher, as attorney-general of the state and as a citizen of the town of Pontotoc, filed a petition before the Railroad Commission, reciting therein the former order of the commission in reference to the depot site made January 12, 1904, and the litigation hereinbefore set out between the state and the Railroad Commission on the one hand and the railroad companies on the other, and the fact that a final decision had been rendered, as above set forth, fixing the location of the line of railroad, and reciting, also, that the injunction suit, which had been reinstated by the railroad companies to enjoin the execution of the order of the Railroad Commission made January 12, 1904, had been abandoned and dismissed; and it was prayed in this petition that the commission would make an order requiring the railroad companies to discontinue the use of the depot in the western part of the town of Pontotoc and comply with the former order of the commission as to the depot site. On June 17, 1908, this petition came on to be heard before the Railroad Commission, and an order was entered reciting the filing of the petition and that the railroad companies were present and consenting that the prayer of the petition should be granted, and thereupon it was ordered that the depot should be removed from its location to the old site, the order to be effective thirty days from its date. While the railroad companies steadfastly opposed following the old line and rebuilding the depot on that line, it seems that by this time they had become convinced that further opposition was futile, and thereupon it seems that a temporary arrangement was made between the railroad company and the repre-

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sentative of the state, by which the line as built and the depot as constructed should be used until such time as the road could be changed to the old line, when it was contemplated that the depot should be established and rebuilt on the old site.

This being the status of affairs, on July 20, 1908, the appellants, Cooper and ten other citizens of Pontotoc, filed the the bill in this case against the appellee, the Mobile, Jackson & Kansas City Railroad Company, averring that on or about January 1, 1904, having no railroad depot in Pontotoc, the railroad company invited the co-operation of the citizens in determining the place at which a depot should be established, in order that it might be accessible and convenient for the citizens of the town and for the railroad company; that in response to said invitation there was a public mass-meeting of the citizens of Pontotoc and vicinity, at which were present the officials of the defendant company; that a committee was appointed to consult with the officials of the company as to a proper and suitable location for the depot, with full authority to agree with such officials as to the location of the depot, having due regard to the convenience and accessibility thereof for railroad company and the public; that the committee came to an agreement with the railroad company that the depot should be established at the present location in the western part of the town; that in accordance with this agreement the railroad company immediately thereafter in apparent good faith, claiming to believe that the place selected was most convenient and suitable for the depot, erected a commodious depot building and opened the same for the transaction of business; and that the same has since that time been maintained as the depot of the defendant. The bill further alleged that the place selected and agreed upon and being now used as a depot by the public and the defendant company is reasonably accessible and convenient for both the company and the public, and more so than any other location within the corporate limits of the town; that complainants, relying upon the express and implied agreement of the railroad company to main-

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tain the depot at this place, expended large sums of money in the purchase and improvement of property situated near by, and that they are individually interested in having the depot maintained at said place. The bill further alleged that the railroad company, without lawful excuse or jurisdiction, threatened to and was undertaking to remove said depot building to another place, and would do so unless restrained by legal proceedings; that to discontinue said depot would be a great inconvenience to the public, and would cause special, pecuniary, and irreparable damage to plaintiffs. The bill further alleged that the company had no legal right to abandon said depot, and that the attempt to do so would be to exercise arbitrary and unlawful discretion. The bill prayed for a temporary injunction forbidding the defendant from removing the depot, and asked that on final hearing this injunction should be made perpetual and for general relief. The bill was sworn to, and an answer under oath was waived. By the fiat of the judge of the third district the temporary injunction was ordered to issue upon the complainants giving bond, conditioned according to law, in the sum of $1,500.

The injunction was duly issued, and the defendant railroad company answered the bill, not under oath, setting up as exhibits the records and opinions in the chancery suit above referred to, and also the orders of the railroad commission in reference to the location of the depot. The answer admitted the allegation as to there being no depot in the town, and the invitation to the citizens, and their participation in the selection of a depot site; admitted that the railroad company and a large part of the citizens agreed upon the location in the western portion of the town; and admitted that it was then believed that the site agreed upon was as convenient and accessible to the interested public as any that could be obtained. It was not denied that the complainants had expended large sums of money in the purchase and improvement of property situated near the depot site; but it was denied that without lawful excuse or justifica-

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tion the defendant was undertaking to discontinue and remove the depot. Defendant denied the allegation that to remove the depot would be a great inconvenience to the public, but admitted that some pecuniary damage might be suffered by complainants or some of them; but it was contended that the defendant was in no way responsible for such damage. It was denied that the company had no lawful right to remove the depot. The answer then set up the orders of the railroad commission and the litigation before referred to, and it was averred that the defendant did not desire to obey the order of the commission of January 12, 1904, an that it had filed its bill in the federal court to enjoin the enforcement of this order. Further, the answer set up that the defendant had resisted to the last the litigation instituted by the state and the railroad commission to compel the building of the road on the old line; but the defendant stated that after it had failed in the litigation, and it had been finally decided that the railroad should be built upon the old line, and the railroad commission had by two orders directed the building of the depot on the old line, it had conclued that further resistance was useless, and that it would obey the decree of the court, and said orders of the railroad commission in reference to the location of the depot; that it was in good faith proceeding to comply with the decree and said orders, and had entered into a temporary arrangement by which it was to have time to rebuild the railroad and to locate the depot on the old site, when it was enjoined from doing so; and it was averred that no alternative was left it but to obey the decree of the court under heavy penalties for any disobedience. The answer further set up that the defendant had its men and equipment at the town of Pontotoc for the purpose of executing its agreement with the railroad commission and the state of Mississippi to remove the depot to the old site, and that it had been delayed in this work by the suing out of the injunction.

A motion was made by the defendant to dissolve the injunction upon bill, answer, exhibits, affidavits, and records in said

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chancery case. Notice was given of this motion, and the same heard by the chancellor in vacation on August 3, 1908, a decree was entered sustaining the motion, dissolving the injunction, and dismissing the bill. The decree also awarded damages to the defendant on the injunction bond in the sum of $188.33. The complainants prayed and obtained an appeal to this court, but supersedeas was disallowed. In this court an agreement of counsel is filed, showing that the case was heard on the pleadings, exhibits, and records hereinbefore set forth, and that the transcript contains all the pleadings and proceedings in the case, except the evidence that refers to the amount of damages awarded for the suing out of the injunction; it being agreed that the court did not err in assessing damages, unless is should be held that the injunction was improperly dissolved. The one assignment of error is that the court erred in sustaining the motion to dissolve the injunction and awarding damages. It may be noted that in 1906, pending the litigation above set out, a special act of the legislature was passed which attempted to ratify and confirm the abandonment of the old line of the narrow-gauge railroad before mentioned; but this act was held unconstitutional and void. See *Railroad Co. v. State,* 89 Miss. 724, 41 South. 259.

It seems obvious that the decree must be affirmed. The orders of the railroad commission fixing the location of the depot are not assailed, except indirectly and collaterally. The commission is not made a party defendant. Obedience to its orders has never been restrained or enjoined by the judgment of any court. But we do not consider it necessary to decide whether or not these orders are of themselves valid and conclusive as to the location of the depot. The decree of this court, affirmed by the decision of the supreme court of the United States, finally and definitely fixed the location of the railroad on the old line. While the location of the depot was not directly involved in that litigation, the effect was to remove the depot from the present site, because, of necessity, the depot must be on the railroad,

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Brief for appellant.

and it is apparent that there is no necessity for two depots in the town of Pontotoc. It is true the railroad company desired to build the line around through the western part of the town, and to locate the depot there, and it took the position that this was a convenient, accessible, and proper place for the depot; but, since the location of the main line has been determined adversely to its contention, there is nothing left for it to do but to build the railroad on the old line, and the relocation or the removal of the depot necessarily follows.

The decree is *affirmed.*

ALBERT BOOZE v. YAZOO CITY.

[48 South. 820.]

94 428
95 402

CRIMINAL LAW AND PROCEDURE. *Evidence. Facts calculated to discredit state witness's statements.*

Testimony calculated to cause the jury to doubt the truth of material statements made by a witness for the state in a criminal case should not be rejected; the question as to whether it be purely speculative is for the jury.

FROM the circuit court of Yazoo county.

HON. WILEY H. POTTER, Judge.

Booze, appellant, tried and convicted before the mayor of Yazoo City, on the charge of unlawfully selling intoxicating liquors within the municipality, appealed to the circuit court; was tried there *de novo,* convicted, fined $250, sentenced to imprisonment in the county jail for thirty days, and appealed to the supreme court.

The opinion of the court states the facts.

Campbell & Campbell, for appellant.

The court erred in not granting appellant's request for a new venire and also erred in refusing to allow the evidence of dif-

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Brief for appellant.

ferent witnesses sought to be introduced by appellant. The court also erred in permitting counsel for Yazoo City, the prosecutor in this case, in his closing argument before the jury to read an article from a newspaper, over appellant's objection.

The evidence showed that a detective gave to one Kennedy, money with which to buy whiskey and that Kennedy brought to the detective a pint of whiskey, stating that he had bought it from Booze, the appellant; and the detective testified as to this, his testimony being the only direct evidence of the sale. Appellant denied having sold the whiskey to Kennedy, and sought to prove by Howard, the agent of the American Express Company, that on the date of the alleged sale Kennedy himself had received a gallon of whiskey from the express office. Appellant also offered to prove that Kennedy on that date had told different parties about having whiskey and that he, Kennedy, could let such parties have some of it, and that Kennedy actually did let different persons have whiskey. The action of the court in refusing to admit such evidence in regard to Kennedy constituted reversible error. It had already been shown in evidence that the premises of appellant had been searched by the city police, and no whiskey had been found. It was materially important to appellant to show, not only that he himself had no whiskey, but that Kennedy, who practically was the accuser in the case, did have on the very day in question plenty of whiskey. There could legally be no question as to the competency of such testimony. 1 Wigmore on Evidence, §§ 139, 144.

Inasmuch as the detective, Kennedy, was the only witness who testified that appellant sold the whiskey, any testimony tending to show that the testimony of Kennedy was untrue, or which would raise in the minds of the jury, reasonable doubts of its truth, should have been admitted.

On the facts this was a very close case, and there is grave doubt as to the guilt of appellant, and he should have been given every opportunity to present his defenses fully before the jury.

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Brief for appellee.

Holmes & Holmes, for appellee.

In regard to the contention of learned counsel for appellant that appellant should have been granted a new venire under the circumstances, the record shows that there was actually no reason for a new venire. As regards the objection that counsel for appellee, in argument before the jury, read a statement from a newspaper, the facts are that neither the jury nor anyone else in the court room, except counsel for appellee, knew the source of the quotation. The author of the article was not stated nor was the name of the newspaper given. Furthermore, counsel, in reading the quotation, did not hold the newspaper in his hand, but merely a small paper clipping, and had only read a part of it when his time limit before the jury expired and he was stopped by the court.

The only ruling on the testimony adverse to appellant, Booze, was with regard to the possession by the witness Kennedy of a gallon of whiskey on the date of the sale, but the record distinctly shows that the whiskey in the possession of Kennedy was of a different kind from that which was bought from Booze. This evidence was properly excluded by the court for the reason that Kennedy was not on trial, and the possession by Kennedy of other whiskey than what he bought from Booze would not tend to prove or disprove the mean question at issue.

George Butler, assistant attorney-general, on the same side.

It is contended by appellant that the court below should have permitted him to prove that Kennedy had been selling whiskey and that on the day of appellant's alleged sale Kennedy received a gallon of whiskey from the office of the local express company. The exact questions along this line are:

Q. "Kennedy, have not you been selling whiskey?" No answer and objection to the question sustained.

Q. "Kennedy, on that very day, October 17th, did not you go to the express office and get a gallon of whiskey for yourself?" No answer and objection to the question sustained.

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Opinion of the court.

Kennedy was next asked if he had ever been convicted or fined for selling whiskey and to this he was permitted to answer. He was next asked if he had ever been arrested on the charge of selling intoxicating liquors and this question was objected to and objection sustained. It will be seen that the appellant was allowed to attack the credibility of Kennedy as a witness, under Code 1906, § 1923, but was not permitted to show that Kennedy had been accused of a crime, or that he had whiskey in his possession.

It certainly would have thrown no light upon the question at issue to have proved that Kennedy had been accused of selling whiskey, and it was not permissible to impeach him in that way.

MAYES, J., delivered the opinion of the court.

We take no notice of any of the objections urged by counsel for appellant, other than what shall be stated in the opinion, as it is our view that none of the objections have any merit, save the one herein discussed.

The testimony shows that one Carpenter was employed as a detective to ferret out the blind tigers (persons engaged in the unlawful sale of intoxicating liquors) in Yazoo City. Some time in October, 1908, he approached one Pierce Kennedy and asked him if he could get him some whiskey, saying at the time that he (Carpenter) had the money if Kennedy knew where to get it. Kennedy stated he thought he could get the whiskey, whereupon Carpenter gave him seventy-five cents and Kennedy left, shortly returning with a pint of whiskey. Kennedy was introduced as a witness on the part of the state in the prosecution against Booze, and testified that he bought the whiskey from the defendant, and if this conviction is to stand it rests alone on the testimony of Kennedy. On cross-examination the defendant offered to show that, on the very day when Kennedy claims to have bought the whiskey from him (the defendant), Kennedy had gotten out of the express office a gallon of whiskey himself. This testimony was objected to, and the court

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sustained the objection. The defendant, after denying that he had sold any whiskey to the prosecuting witness, Kennedy, then offered to prove by Howard, the agent of the American Express Company, that the records in his possession as express agent show that, on the very day it is claimed by Kennedy that the sale of whiskey was made to him by Booze, the defendant, Kennedy himself had a gallon of whiskey which he had that day gotten from the express office. The defendant also offered to prove that on that day Kennedy had told other parties he had whiskey and could let them have it, and that he did let other parties have whiskey. All this testimony was objected to and excluded, and in this, we think, under the peculiar facts of this case, the court erred.

Any testimony which tended to show that the testimony of Kennedy, the prosecuting witness, was untrue, or which would raise in the minds of the jury a reasonable doubt of its truth, should have been admitted. Carpenter only knew that he had given Kennedy seventy-five cents, and that Kennedy had taken the money, and kept it, and returned with the whiskey. Kennedy disclaimed selling the whiskey to Carpenter, and asserts that he bought it from Booze, which Booze denied. As tending to support his denial, he offers to show that Kennedy did on that day have whiskey; that he had told others that he had it, and offered it to them. This testimony should have gone to the jury for what it was worth, as tending to show that the claim of Kennedy that he bought the whiskey from the defendant and did not sell it himself was untrue. In the language of Mr. Wigmore, this testimony should have gone to the jury "because, if it really was of no appreciable value, no harm is done in admitting it; while, if it is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative, but should afford the accused every opportunity to create that doubt. A contrary rule is cruel to really innocent accused." 1 Wigmore, Ev. § 139.

Reversed and remanded.

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Statement of the case.

JAMES W. ADAMS ET AL. v. FIDELITY MUTUAL LIFE INSURANCE COMPANY.

[49 South. 119.]

1. BONDS. *Suits on. Open accounts. Code* 1892, § 1801. *Code* 1906, § 1978.

A suit upon a bond is not within Code 1892, § 1801 (Code 1906, § 1978), authorizing the proof of open accounts by affidavits, although the damages recoverable for a breach of the bond be the value of goods charged in the account.

2. JUDGMENTS. *Want of notice. Justice of the peace. Appeal. Circuit court.*

A defendant against whom a judgment has been rendered in a justice's court without notice, may assail its validity on direct appeal to the circuit court.

FROM the circuit court of Lowndes county.

HON. J. L. BUCKLEY, Judge.

The Fidelity Mutual Life Insurance Company, appellee, a corporation, was plaintiff in the court below; Adams and others, appellants, were defendants there. From a judgment in plaintiff's favor defendants appealed to the supreme court.

The Fidelity Mutual Life Insurance Company began suit before a justice of the peace on a bond in the company's favor executed in February, 1906, by Adams as principal and three others as sureties. The suit was begun by the filing of a declaration on a bond, alleging that Adams had failed to account for certain money, $119.98, belonging to the company; and to the declaration was appended the bond in question and a sworn itemized open account of the alleged indebtedness for which judgment was demanded. There was a judgment before the justice of the peace in plaintiff's favor, and on appeal the case was tried *de novo* in the circuit court. The defendant, Adams, in the circuit court, pleaded in abatement that he had not been

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Brief for appellants.

served with summons five days prior to the trial of the cause in the court of the justice of the peace. The transcript of the justice of the peace recited that Adams had been properly served. Upon motion of plaintiff the plea in abatement was stricken out, because the transcript showed that Adams signed the bond for appeal to the circuit court. The other defendants, who were sureties on the bond, pleaded separately and specially, alleging that there had been no breach of the condition of the bond. Upon motion of plaintiff, this plea was stricken out because not verified by oath. On the trial the plaintiff introduced the itemized sworn account to which the defendants had made no counter-affidavit as required by Code 1892, § 1801 (Code 1906, § 1978). Defendants offered to prove by the constable that Adams had not been served on the date shown by the constable's return of process, but the circuit court refused to allow the testimony, and granted plaintiff an instruction to the effect that, if from the evidence, the jury believed the indebtedness had been established by the sworn affidavit of the plaintiff, they should find for the plaintiff against all of the defendants.

J. W. Loving, for appellants.

As the bond in question was executed by appellants on February 10, 1906, we must look to Code 1892, § 1801, to determine whether the action of the court below in instructing the jury in favor of appellee, was correct. Code 1892, § 1801, provides that a person who sues on an open account shall be entitled to judgment on affidavit of its correctness unless the defendant shall make counter-affidavit that the account is not correct. This code section has reference to suits upon open accounts but has no application to suits upon bonds. It was obligatory upon the appellee as plaintiff to establish the correctness of the item embraced in the account, and to prove also that the bond covered liability for such items. *American Surety Co. v. United States,* 76 Miss. 289, 24 South. 388.

It was error in the court below to strike out the plea in abate-

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ment and preclude the appellant, Adams, from attacking the judgment of the justice of the peace on the proof that he was not served with summons five days prior to the trial in the justice's court. *Comenitz v. Banks,* 85 Miss. 662, 38 South. 35; *Dufour v. Chapotel,* 75 Miss. 656, 22 South. 387.

Orr & Harris, for appellee.

The court of the justice of the peace is a court of record in Mississippi, and has recognized jurisdiction. In this case the judgment of the justice of the peace, as set forth in the transcript of his proceedings, distinctly shows that all of the defendants were present in his court and interposed no objection to the judgment against them. The circuit court was entitled to give full faith and credit to the proceedings in the justice's court. *Hughston v. Cornish,* 59 Miss. 372; *Murrah v. State,* 51 Miss. 652.

FLETCHER, J., delivered the opinion of the court.

This suit was instituted on the bond of Adams, executed to appellees; the principal and sureties being sued. The sureties answered, denying that there had been any breach of the conditions of the bond. No proof whatever was offered by plaintiff showing that there had been any such breach. He contented himself with offering an itemized account, properly sworn to, to which there was no counter affidavit. The court, however, struck out the plea of the sureties and practically directed a verdict for the amount sued for, instructing the jury that a verdict should be for the plaintiff if the plaintiff's demand had been proven by the itemized and verified account, and declining to grant the peremptory instruction requested by the defendants.

Bearing in mind the obvious fact that this is a suit on the bond, the case is perfectly controlled by the opinion in *American Surety Co. v. United States, etc.,* 76 Miss. 289, 24 South. 388. It is there said: "But the court proceeded on the errone-

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ous view, throughout the trial, that the suit was an action of assumpsit on an open account, and that the items embraced in the account could be established by the affidavits made for the Melton Hardware Company and filed with the account. This was not an action of assumpsit for materials sold by the hardware company to Stowell & Co. It was a suit upon a bond, with distinct assignment of breach of the bond, in the usual and ordinary form. The reference in the declaration to the materials furnished by the hardware company to Stowell & Co., and the filing of the itemized account as an exhibit, were intended only to show the measure of the damages recoverable for the breach of the bond sued on. Section 1801, Ann. Code 1892, has reference to suits upon open accounts only, and has no application in suits upon bonds and plainly the present suit was upon the bond. The plaintiff below should have been required, by competent evidence, to establish two things: First, the correctness of the items embraced in the account; and, second, that these items were for material furnished for the construction of the courthouse. Until this had been done plaintiff was not entitled to judgment."

For this error, if there were no other, the case would have to be reversed. However, since there must be a new trial, it is well to remark that appellant Adams is not precluded from making an attack upon the judgment rendered by the justice of the peace merely because he has executed an appeal bond to the circuit court. That question is distinctly decided in *Dufour v. Chapotel*, 75 Miss. 656, 23 South. 387.

Reversed and remanded.

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Brief for appellant.

ILLINOIS CENTRAL RAILROAD COMPANY v. ELIJAH M. BADLEY.

[49 South. 114.]

GARNISHMENT. *Exemption suggested. Claimant.*

Where a garnishee has suggested that the debt due from him is claimed by the defendant as being exempt from liability to his creditors, under Code 1906, § 2346, authorizing such procedure, the court can take no further steps in the case until the process required by the statute has been served on defendant, and a judgment awarding the funds to a claimant before the service of such process is erroneous.

FROM the circuit court, of, second district, Yalobusha county. HON. SAMUEL C. COOK, Judge.

One Fletcher was plaintiff in the court below; he sued out an attachment against one Vernon, a nonresident, and garnished the railroad company, appellant. The garnishee answered admitting an indebtedness of $63 due Vernon, but suggested, under Code 1906, § 2346, that the debtor claimed the sum as exempt, the same being due him as wages due a laborer. Badley, the appellee, interposed a claim to the fund as being due to him and not to Vernon. The court below, without issuing process for the defendant, awarded the sum admitted to be due by the railroad company to the claimant, Badley, and rendered judgment in his favor against the garnishee for the full sum admitted by the answer. From this judgment the railroad company, garnishee, appealed to the supreme court.

Mayes & Longstreet, for appellant.

The appellant's sole desire in this case is that when it pays the money over into court it shall get good acquittance of itself from further liability. The record, as made up by Badley, the appellee in this case, is insufficient, and a judgment in his favor against appellant is void upon its face, and his receipt to

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Brief for appellee.

appellant for the money would be of no value. Badley, when he came into court and propounded his claim, failed to see to it that an issue was made up with the original debtor, Vernon, the defendant in the attachment proceedings, to determine the question whether Badley did or did not hold a valid assignment.

The present attitude of things is that a judgment has been rendered appropriating to a claimant the indebtedness of the railroad company to the defendant in attachment, without any notice to him of the claim. The attachment was for an indebtedness due to one Fletcher. It might well be that the defendant in attachment would not care to controvert this debt or care to defeat the appropriation of so much of his wages as might be necessary to the payment of that debt. The sum of $25 was all that he was sued for. Defendant seems to have made default, and this most likely because he did not object to paying that sum to plaintiff, but instead of a judgment being rendered for $25 and costs one is rendered condemning the entire debt of the appellant to him, and directing it to be paid, not to the attaching creditor, but to the appellee, Badley.

The whole proceeding is statutory and the statute has not been followed.

Kimmons & Kimmons, for appellee.

This case was submitted to the court, a jury being waived, the evidence was heard, and on that evidence the court below held the claimant to be entitled to a judgment. Under the circumstances, the action of the court will be presumed to have been correct.

Code 1906, §§ 2351–2352, gives the court the right to try the cause and dispose of the fund in controversy. The only contention by the garnishee in the court below was that the court should have suspended proceedings in order to have a summons issued for the defendant, Vernon, to appear and claim his exemption in accordance with Code 1906, § 2346.

Code 1906, § 2346, is applicable only where a third party

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claims the garnished money by assignment of the fund. The defendant, Vernon, could assign his money whether it was exempt or not; and as he has assigned the money to Badley, Badley was entitled to a judgment.

It surely cannot be true that this court will permit a garnishee to force a person into the court below to litigate with others, then tie his hands so that no suit could be brought by him, and, when his rights to the money are clearly established, declare that he should not be entitled to a judgment for the money.

FLETCHER, J., delivered the opinion of the court.

One Fletcher sued out an attachment against Romer Vernon, seeking to collect an indebtedness of $25, and by proper averments had the appellant railroad company summoned as garnishee. The railroad company answered, and admitted an indebtedness of $63.17, but suggested that Vernon would probably claim this money as exempt. The company further suggested that appellee, Badley, claimed the money under an assignment. Upon the filing of this answer, Badley appeared and claimed the fund. No summons was ever issued to Vernon, nor was he ever notified in any way of the pendency of the proceeding. Fletcher seems to have abandoned his suit entirely, and the court thereupon rendered judgment against the garnishee in favor of the claimant Badley for the full amount of the indebtedness admitted. The railroad company prosecutes this appeal, insisting that the judgment rendered affords the garnishee no protection against a subsequent demand by Vernon, who has never been summoned as the law directs

Section 2346 of the Code of 1906 provides: "Any garnishee who answers admitting an indebtedness, or the possession of property due or belonging to the defendant, may show by his answer that he is advised and believes that the defendant does or will claim the debt or property, or some part thereof, as exempt from garnishment, levy or sale; and, upon the filing of

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Statement of the case.

such answer, the clerk or justice of the peace shall issue a summons or make publication, if defendant be shown by oath to be absent from the state, for the defendant, notifying him of the garnishment and the answer, and requiring him to assert his right to the exemption. Proceedings against the garnishee shall be stayed until the question of the debtor's right to the exemption be determined. If the defendant fail to appear, judgment by default may be taken against him, adjudging that he is not entitled to the property or debt as exempt; but if he appear, the court shall, on his motion, cause an issue to be made up and tried between him and the plaintiff." The exemption was duly suggested, and the court was without power to proceed in this cause until a summons had issued notifying the suggested exemptionist of the garnishment proceeding and requiring him to assert his right.

Reversed and remanded.

ARTHUR BELL v. SOUTHERN RAILWAY COMPANY.

[49 South. 120.]

RAILROADS. *Passengers. Riding on platform. Truck left near track.*

Where a passenger is without fault in being upon the lower step of a railway coach he may recover from the company for injuries received by being carried in contact with a truck, negligently left too close to the track.

FROM the circuit court of Webster county.

HON. GEORGE A. MCLEAN, Judge.

Bell, the appellant, was plaintiff in the court below, and the railway company, appellee, was defendant there. From a judgment in favor of defendant the plaintiff appealed to the supreme court.

Appellant sued the railway company for injuries received through the alleged carelessness and negligence of the company.

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Brief for appellee.

He testified that, as he stepped upon the bottom step of the appellee's passenger coach, the train began to move and appellant's heel struck a truck standing close to the railroad track, which caused him to fall from the step, receiving the injuries in question. Appellee defended on the ground that appellant was himself guilty of negligence, and that appellee was not guilty of any wrong. The court peremptorily instructed the jury and it found in favor of the defendant.

Dunn, Gould & McKeigney, for appellant.

It was negligence on the part of the railroad company to permit the truck of the express company to be left so near the track of the railroad company, at its depot, as to catch the heel of a passenger on the step as the train moved out of the depot station. The fact that the train had stopped at the depot station was an invitation to passengers to board it. *Chicago, etc., R. Co. v. Chancellor,* 60 Ill. App. 525.

A carrier is bound to use extraordinary care as to the safety of its station grounds and tracks about its passenger depots. 3 Thompson, Negligence, 146. This is not a case where a man, with his foot on the ground, clutches the hand-hold or railing of the car, while trying to board a rapidly moving train. It is a case where a man who has boarded a train before it starts, and who is trying to get upon the platform of the car, is knocked from the steps of the car by having his foot caught by an obstruction negligently placed so near to the track as to be dangerous.

The fact that the express company's truck did not belong to the appellee, is immaterial here. *Mangum v. Railroad Co.,* 145 N. C. 152; *Wooten v. Railroad Company,* 79 Miss. 26, 29 South. 61.

Catchings & Catchings, for appellee.

The negligence alleged in the declaration and the injuries sued for must bear the relation of cause and effect. The concurrence of both, and the nexus between them must exist, to

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constitute a cause of action. *Benedict v. Potts,* 40 Atl. 1068. The peremptory instruction in favor of appellee was fully justified by the testimony. As stated by this court in the case of *Wooten v. Railroad Company,* 79 Miss. 26, 29 South. 61, the general rule is that to board a train in motion is negligence as a matter of law, and sufficient to bar recovery for resulting damages. While the court recognizes execptions to the rule, it applies the rule as stated. There can be no exception to the rule except where an intending passenger under stress of time and under some particular circumstances, attempts to get on a moving train. The testimony shows that there was no stress of time and no particular circumstance to affect the general rule.

A passenger, attempting to board a moving train, is guilty of negligence as a matter of law, and will be precluded from recovery. The testimony of appellant, Bell, shows plainly that he was standing by the car for some minutes before it started, and that he was in no way prevented from boarding it by any business engagement, but that he continued to talk with his cousin merely as a matter of personal pleasure until the engine bell rang. He testified that he then stepped on lowest step of the car and, before he could get upon the second and higher step, his heel was struck by the truck. Had he boarded the train before it began to move, he would have sustained no injury.

It is undoubtedly the duty of the railroad company to keep its passenger depot platforms in such condition that passengers intending to embark upon its train can easily move across the platform to the train without danger; but a depot platform has no other function to perform than to afford a safe means of ingress and egress to and from the train. If the railroad company's depot platform furnished such safe ingress and egress it has fully discharged its duty to passengers in this respect.

FLETCHER, J., delivered the opinion of the court.

Plaintiff's testimony in this case tended to show, not that he boarded the train while it was in motion, but that he got upon

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Statement of the case.

the first step before the train started. The train started immediately, and when plaintiff raised his foot to advance to the second step his heel was caught by an express truck, which was standing against the railroad track so near the passing coach as to strike plaintiff's foot. Plaintiff was knocked from the car steps and injured.

This being the case as made by the plaintiff's testimony, it was error for the court to give a peremptory instruction for the defendant railroad company. This is not the case of a passenger boarding a moving train; and it is settled law that it is negligence for a railroad company to permit a truck to stand so near the track as to strike passengers who are in the act of taking passage on the train. *Wooten v. Mobile, etc., R. Co.*, 79 Miss. 26, 29 South. 61.

It is hardly necessary to add that conflicts in the testimony are for the jury, not for the court.

Reversed and *remanded.*

LAURA WELCH v. ANDREW CLIBURNE.

[49 South. 184.]

BASTARDY. *Code* 1906, §§ 268 *et seq.* *Married woman.*

A woman canot maintain bastardy proceedings against the father of her illegitimate child under Code 1906, §§ 268 *et seq.*, governing such actions, if she be married at the time of its birth, although deserted by her husband.

FROM the circuit court of Simpson county.

HON. ROBERT L. BULLARD, Judge.

Laura Welch, the appellant, was plaintiff in the court below, and Cliburne, the appellee, was defendant there. From a judgment in defendant's favor the plaintiff appealed to the supreme court.

The opinion of the court states the facts.

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Brief for appellee.

R. L. & E. L. Dent, and *J. P. Edwards,* for appellant.

Code 1906, § 268, provides that "when any single woman shall be delivered of a bastard, or being pregnant with child which if born alive would be a bastard, shall make complaint against the father of the child to any justice of the peace of the county where she may be so delivered, the justice shall issue a warrant for the person accused," etc. Our contention is that, notwithstanding the fact that appellant married Welch before she was delivered of the child which by the demurrer was conceded to be the child of appellee, she can still recover of appellee, and this, notwithstanding the further fact that she was a married woman, wedded to Welch, at the time she instituted proceedings against the appellee, Cliburne.

The fact that the mother is a married woman will not preclude her from instituting suit for recovery of the support of her child born out of wedlock. 5 Cyc. 650; *State v. Ingram,* 5 Tenn. 221.

Hilton & Hilton, and *Chalmers Alexander,* for appellee.

It will be noted that the appellee was married to Welch when she went before the justice of the peace and set in machinery the proceedings called for in Code 1906, ch. 15, against appellee. She was also married to Welch some few months before the child in question was born. Her marriage to Welch shut her off from making complaint against Cliburne under Code 1906, ch. 15.

The bare facts are here undisputed. A married woman had a baby, and she says that it is the son of one who is not her husband. But will her say-so make the child a bastard in law? Does not the law, for policy's sake, hold that the child, when born after the woman's marriage to her husband, is to be conclusively considered the child of the husband? See 60 L. R. A. 699; 5 Cyc. 65; *Limestone v. Kerr,* 17 Ala. 328; *Pruitt v. County Judge,* 16 Ala. 705.

The case of *State v. Ingram,* 3 Tenn. 377, cited by appellant,

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is not in point, inasmuch as the woman in that case was unmarried at the time she instituted suit against Ingram, and the child was born before her subsequent marriage.

WHITFIELD, C. J., delivered the opinion of the court.

This was a proceeding under chapter 15, Code of 1906, to compel appellee to support a child, alleged to be a bastard. The appellant, after she had been gotten with child, as alleged by appellee, married another man, who, upon finding out that she was pregnant, deserted her. The child was born some months later, and appellant then filed this proceeding against the appellee; she being at the time of the filing of the complaint, a married woman. The point was made in the court below that she could not maintain the proceedings marked out in said chapter 15, because such chapter refers alone to a single woman who shall have a bastard. This point was maintained by the court below, and the proceedings dimissed.

We thing the action of the court below was correct under our statute. The language of Code 1906, § 268, is: "When any single woman shall be delivered of a bastard, or being pregnant with a child which, if born alive, would be a bastard, shall make complaint," etc. A child born in wedlock is presumed to be legitimate until the contrary is shown; and the child referred to in the second clause of the statute means a child which, when born, will be in the eye of the law a bastard—that is to say, the child of a single woman. Code 1906, § 273, provides that "the death of the bastard, if the mother be living and unmarried, shall not be cause of abatement or bar to any prosecution for bastardy." This clause and other expressions in the chapter, but especially the language of section 268, plainly show that the provisions of the chapter apply alone to single women. The case of *State v. Ingram,* 4 Hayw. (Tenn.) 221, found in 3 Tenn. (Cooper's Ed.) 377, is cited by the learned counsel for appellant; but the statement of facts in that case shows that the woman was a single woman at the time she charged Ingram with

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being the father of her child; the child having been born while she was such single woman. That case is, therefore, of no authority here.

The cases generally may be found cited in 5 Cyc. at page 650, note 48. In the case of *Judge of the County Court of Limestone v. Kerr,* 17 Atl. 328, the point is expressly decided as we decide it, and upon a like statute. In that case Mary Simpson filed a complaint against James H. Kerr for the support of her bastard child. It appeared, on the trial, that Mary Simpson was a married woman, but that her husband had abandoned her several years before the birth of the child, and speaking of this the court said: "On this evidence, the court instructed the jury that, if they believed that Mary R. Simpson was a married woman, they must find for the defendant, notwithstanding they might believe him to be the father of the child. The statute under which these proceedings were had evidently contemplates that a single woman alone can prefer a complaint of bastardy against one who may be the father of the bastard. The language of the act is: 'When any single woman, who shall be pregnant or delivered of a child which by law would be considered a bastard, shall make complaint,' etc. As this statute is penal in its nature, it must be strictly construed, and a married woman cannot be permitted to prefer the complaint, although she be delivered of a bastard during coverture. This construction was placed on the act by this court in the case of *Pruitt v. Judge of the County Court,* 16 Ala. 705." This statute is like our, and we think the proper construction was put upon it by the supreme court of Alabama.

The judgment is *affirmed.*

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Brief for appellant.

SAMUEL JOHNSON v. YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

[47 South. 785.]

RAILROADS. *Passengers. Negligence. Contributory negligence. Riding on vestibuled platform.*

A passenger, injured by the negligence of the railroad company, was not as a matter of law guilty of such contributory negligence as will defeat his recovery merely because he was riding at the time of the injury on a vestibuled platform of a moving passenger train.

FROM the circuit court of Warren county.

HON. JOHN N. BUSH, Judge.

Johnson, the appellant, was plaintiff in the court below and the railroad company, appellee, was defendant there. From a judgment in defendant's favor predicated of a peremptory instruction the plaintiff appealed to the supreme court.

The action was for recovery of damage for personal injury alleged to have been caused by defendant's negligence. The oplnion of the court states the facts.

N. Vick Robbins, and *Alexander & Alexander,* for appellant.

The conduct of complainant in walking out on the platform was not contributory negligence as a matter of law. *Dougherty v. Yazoo, etc., R. Co.,* 84 Miss. 502, 36 South. 699; *Yazoo, etc., R. Co. v. Byrd,* 89 Miss. 308, 42 South. 286.

Whether the placing of the box in the passageway on the platform of the vestibule and leaving the vestibule door open on an unlighted platform, is such reasonably safe operation of the train as to excuse defendant, whether it were the usual and ordinary operation or not, is for the jury.

Fore v. Alabama, etc., R. Co., 87 Miss. 211, 39 South. 493, 690; *Thompson v. Yazoo, etc., R. Co.,* 72 Miss. 715, 17 South. 229; *Bronson v. Oakes,* 22 C. C. A. 520, 40 U. S. App. 413, 76

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Brief for appellee.

Fed. 734; *Sioux City, etc., R. Co. v. Stout,* 17 Wall. 657, 21 L. Ed. 745; *Grand Trunk R. Co. v. Ives,* 144 U. S. 408, 417, 428, 36 L. Ed. 485, 489, 492, 12 Sup. Ct. Rep. 679, 683, 687; *Jones v. East Tennessee, V. & G. R. Co.,* 128 U. S. 443, 32 L. Ed. 478, 9 Sup. Ct. Rep. 118; *Scott v. New Orleans,* 21 C. C. A. 402, 41 U. S. App. 498, 75 Fed. 373; *Detroit & M. R. Co. v. Van Steinburg,* 17 Mich. 99; *Augusta R. Co. v. Glover,* 92 Ga. 132, 18 S. E. 406; *Milwaukee & St. P. R. Co. v. Kellogg,* 94 U. S. 469, 24 L. Ed. 256; *Northern P. R. Co. v. Adams,* 54 C. C. A. 196, 116 Fed. 324; *Burt v. Douglas County Street R. Co.,* 83 Wis. 229, 18 L. R. A. 479, 53 N. W. 447; *Louisville & N. R. Co. v. Head,* 22 Ky. L. Rep. 863, 59 S. W. 23; *McAfee v. Huidekoper,* 9 App. D. C. 36, 34 L. R. A. 720; *International & G. N. R. Co. v. Welsh* (Tex. Civ. App.) 24 S. W. 854; *Bonner v. Glenn,* 79 Tex. 531, 15 S. W. 573; *Illinois C. R. Co. v. O'Keefe,* 154 Ill. 508, 39 N. E.. 606; *Dewire v. Boston & M. R. Co.,* 148 Mass. 343, 2 L. R. A. 166, 19 N. E. 523; *Cotchett v. Savannah & T. R. Co.,* 84 Ga. 687, 11 S. E. 553; *Gerstle v. Union P. R. Co.,* 23 Mo. App. 361; *San Antonio & A. P. R. Co. v. Choate,* 22 Tex. Civ. App. 618, 56 S. W. 214; *Louisville & N. R. Co. v. Berg,* 17 Ky. L. Rep. 1105, 32 S. W. 616; *Graham v. McNeil,* 20 Wash. 466, 43 L. R. A. 300, 72 Am. St. Rep. 121, 55 Pac. 631; Hutchinson on Carriers (2d ed.), §§ 652, 1193; Beach on Contrib. Neg. § 3, p. 7; 3 Thomp. Neg. § 2953; *Moore v. Lanier,* 53 Fla. 353, 42 South. 462; *Doolittle v. Southern R. Co.,* 62 C. C. A. 130, 40 S. E. 133; *Illinois C. R. Co. v. Bethea,* 88 Miss. 119, 40 South. 815; *Boss v. Northern P. R. Co.,* 5 Dak. 308, 40 N. W. 590.

Mayes & Longstreet, for appellee.

(The brief of counsel for appellee was lost before the record came into the hands of the reporter, hence no synopsis of their brief can here be given.)

Argued orally by *N. Vick Robbins,* for appellant.

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Opinion of the court.

MAYES, J., delivered the opinion of the court.

On the 10th day of August, 1907, Samuel Johnson took passage on the Yazoo & Mississippi Valley Railroad for the purpose of going from Merigold to Vicksburg. The train on which he embarked was a fast train, commonly called the "Cannon Ball," and vestibuled throughout. The train was a night train, and due at Vicksburg about 12:40 a. m. It seems that after the train whistled for Vicksburg the porter passed through the car where Johnson was, carrying with him a box of some kind, which he placed on the platform, and himself returned inside. After this was done, Johnson got up and got a drink of water, and decided to walk out on the platform, and when he did so his feet came in contact with the box which had been placed in the vestibule by the porter, and he was thrown out, sustaining very serious injuries. It seems that the box was not setting in the passageway leading from car to car, but had been set just outside in the passageway leading to the steps. When the porter went out to set the box down, he not only did this, but for the purpose of subserving his own convenience he raised the trapdoor over the steps and opened the door of the vestibule leaving the vestibule in the nighttime in this unprotected condition, and without light or guard of any kind, and so it was at the time Johnson went out on the platform. The porter testified that, when he went out to open the vestibule and deposit the box in question, Johnson was standing out on the platform, and he told him to go inside the car off the platform; but this is disputed by Johnson. In short, the proof shows that as the train approached Vicksburg this porter, to subserve his own convenience, took this box, placed it in the passageway leading down the steps, opened the trapdoor over the steps, and threw open the vestibule door, so as to permit ingress and egress when the train should stop, returning immediately to the interior of the car, and Johnson, unconscious of the condition of the vestibule as left by the porter, walked out on the platform, stumbled on this box, fell off, plunged down the steps and through the vestibule

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door, sustaining injuries which subsequently resulted in the amputation of his leg. These are the substantial facts of the case, at least as made out by plaintiff's testimony. On the above facts the trial court gave a peremptory instruction to find for the defendant.

It cannot be declared as a matter of law that a passenger on a railway train is guilty of negligence *per se* merely because he rides on the platform of a moving train. Whether he is guilty of such contributory negligence as will defeat a recovery for any injury received while there must depend upon the facts of each particular case. In view of the many modern improvements for safety in railway cars, platforms, train appliances, etc., chief among which is the modern vestibule train, with its close couplings and housed passageways leading from car to car, standing as an invitation by the railway to greater freedom in the use of all parts of its cars by passengers, and making travel almost as safe on the platform as elsewhere, it is readily seen that the rules announced by the older decisions can have but little application, when the only negligence charged is that of riding on the platform of such a train. This is recognized in Hutchinson on Carriers (3d ed.), vol. 3, p. 1406, note 35, and authorities. The same authority says, on page 1407, that "in an action by the passenger, who has received an injury while riding upon the platform of a moving railway car, it would be essential to the defense of the company that the passenger's imprudence in assuming such a position should have been the proximate cause of the injury." In volume 29, p. 417, Cyc., it is said that: "Negligence is a relative term, and depends upon the circumstances of each particular case. What might be negligence under some circumstances, at some time or place, may not be negligence under other circumstances, at another time and place. All the surrounding or attendant circumstances must be taken into account, if the question involved is one of negligence, such as the opportunity for deliberation, degree of danger, and many other considerations or like nature, affecting the standard of

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care which may reasonably be required in the particular case." In the case of *V. & M. Ry. Co. v. McGowan,* 62 Miss. 682, 52 Am. Rep. 205, in that part of the opinion to be found on page 694 of 62 Miss. (52 Am. Rep. 205), this court has said: "There is in the books much confusion on the subject of contributory negligence. . . . Contributory negligence is the want of ordinary care to avoid injury from the act of another. One must use diligence or ordinary care to avoid injury from another, failing in which he may not recover for what by such diligence or care he might have avoided. Whether in any case the plaintiff used the requisite care to avoid injury depends on the circumstances in which he was called to act." In the case of *Miss. Cent. R. Co. v. Mason,* 51 Miss. 234, in that part of opinion to be found on page 244, this court said: "Where the negligence of the defendant is proximate, and that of the plaintiff remote, the action can then well be sustained, although the plaintiff is not entirely without fault. This seems to be now settled in England and in this country. Therefore, if there be negligence on the part of the plaintiff, yet if, at the time when the injury was committed, it might have been avoided by the defendant in the exercise of reasonable care and diligence an action will lie for the injury. . . . Questions of negligence are always to be submitted to the jury, unless where the facts are undisputed and the result of those facts unquestionable, either as proving or disproving such negligence. And where the facts are conceded, but the inference in regard to negligence is still doubtful, depending upon the general knowledge and experience of men, it is the judgment and experience of the jury, and not of the judge, which is to be appealed to." In volume 7 Am. & Eng. Ency. of Law (2d ed.), p. 371, it is said that "contributory negligence is a want of ordinary care on the part of a person injured by the actionable negligence of another, combining and concurring with that negligence and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred."

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Opinion of the court.

In the light of these authorities it can no longer be held that a passenger is guilty of contributory negligence, so as to defeat a recovery for injury inflicted, where it is merely shown that he was riding on the platform of a vestibuled train, if no other act of so-called contributory negligence is shown. No law declared by the case of *Railroad Co. v. Byrd,* 89 Miss. 308, 42 South. 286, can be appealed to as authority for the court's action in sustaining the peremptory instruction for defendant in this case, but quite the contrary. Under the facts of that case, as under the facts of this, the court held that it was not negligence *per se* to ride on the platform. It is true that the facts in the *Byrd case* are quite different from the facts in this case, and the basis of liability quite distinct; but the court held in the *Byrd case* that there was no inflexible rule as to liability or nonliability of the railroad company growing out of the mere fact that a passenger rode on the platform. In the case of *Atlantic Line Ry. Co. v. Crosby,* 53 Fla. 400, 43 South. 318, where it was earnestly urged by counsel that the mere act of riding on the platform of a moving train was negligence *per se,* the court said: "Turning to the authorities cited by defendant, we find that the question chiefly discussed therein is the negligence or contributory negligence of the passenger in going upon or standing upon the platform of the moving train. We find that there is great conflict in the authorities as to whether or not riding or standing upon the platform of a railroad car while the train is in motion or in rapid motion is negligence *per se,* such as to defeat recovery for injuries received by the passenger while occupying such a position. Some courts have held affirmatively as a matter of law that it is such negligence as will bar a recovery, while others have held it to be a question of fact for the jury to determine under all the circumstances in the case as given in evidence. A discussion of the question and many authorities bearing thereon will be found in the following: 6 Cyc. 653, 654; 5 Current Law, 539, 540; Moore's Carriers, 856 *et seq.;* 2 Woods, Railroads (Miner's Ed.), § 308; Beach's Contributory

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Negligence (3d ed.), § 149; Black's Law and Practice in Accident Cases, § 353; Patterson's Railway Accident Law, §§ 271, 272; 5 Am. & Eng. Ency. of Law (2d ed.), 678, 681. The following, among the many cases which we have examined, will prove instructive generally as to the rights and risks of passengers going, standing, or riding upon the platforms of trains: *Marquette v. Chicago & N. W. R. R. Co.*, 33 Iowa, 562, text, 569, 570; *Graham v. McNeill*, 20 Wash. 466, 55 Pac. 631, 43 L. R. A. 300, 72 Am. St. Rep. 121; *Gerstle v Union Pac. Ry. Co.*, 23 Mo. App. 361; *Zemp v. Wlimington & M. R. R. Co.*, 9 Rich. Law (S. C.), 84, 64 Am. Dec. 763; *Woods v. Southern Pac. Co.*, 9 Utah, 146, 33 Pac. 628; *Dewire v. Boston & Maine R. R.*, 148 Mass. 343, 19 N. E. 523, 2 L. R. A. 166; *Agulino v. N. Y., N. H. & H. R. R. Co.*, 21 R. I. 263, 43 Atl. 63; *L. & N. R. R. Co. v. Head* (Ky.) 59 S. W. 23; *Augusta Southern R. R. Co. v. Snider*, 118 Ga. 146, 44 S. E. 1005; *Willis v. Long Island R. R. Co.*, 34 N. Y. 670; *Graham v. Manhattan Ry. Co.*, 149 N. Y. 336, 43 N. E. 917; *Watkins v. Birmingham Ry. & Elec. Co.*, 120 Ala. 147, 24 South. 392, 43 L. R. A. 297; *McAfee v. Huidekoper*, 34 L. R. A. 720, and note thereto."

In the citations above will be found nearly all the authorities bearing upon this subject. We adopt the view of those authorities which hold that the question of negligence, on the facts presented by this record, is a question for the jury to determine.

Reversed and remanded.

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Brief for appellant.

WILLIAM C. BRYANT v. ENOCHS LUMBER & MANUFACTURING COMPANY.

[49 South. 113.]

OPEN ACCOUNTS. *Oath to. Code* 1906, § 1978. *Unascertained credit.*

An open account showing on its face that the party charged is entitled to credit for an unascertained sum, although sworn to under Code 1906, § 1978, making a sworn account in the absence of a counter affidavit *prima facie* evidence of its correctness, does not alone warrant a judgment in plaintiff's favor for the aggregate amount of the items with interest.

FROM the circuit court of, first district, Yalobusha county.

HON. SAMUEL C. COOK, Judge.

The Enochs Lumber & Manufacturing Company, appellee, was plaintiff in the court below; Bryant, appellant, was defendant there. From a judgment in favor of plaintiff the defendant appealed to the supreme court.

The Enochs Lumber & Manufacturing Company sued the defendant, Bryant, on open account duly sworn to for lumber which it had sold him. On the trial the plaintiff introduced its itemized and sworn account, showing an indebtedness of "$365.07 less credit of freight bill on car when produced," and rested its case. There were a number of defenses interposed by the defendant, but no counter affidavit was filed under Code 1906, § 1978, to meet the sworn statement of plaintiff. After the introduction of testimony for defendant the jury, under peremptory instruction of the court, returned a verdict for the plaintiff for $365.07 and interest, being the full amount sued for in the declaration.

Creekmore & Stone, for appellant.

The sworn account upon which appellee rested its case, showed upon its face that the amount claimed was uncertain and indefinite. It is made out for "$365.07, less credit of freight

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Opinion of the court.

bill on car when produced." Under Code 1906, § 1978, appellee has furnished no basis for a judgment, and the court below was not warranted in peremptorily instructing the jury in favor of appellee. One of the fundamental requisites of a sworn account so as to sustain a judgment is that it shall be for a fixed amount.

Kimmons & Kimmons, for appellee.

The account which was sued on by appellee was properly sworn to and in accordance with Code 1906, § 1798. There was no counter affidavit filed by appellant. Appellee was accordingly entitled to judgment. *Bonner v. White,* 78 Miss. 653. There was no testimony offered to show that the lumber in question was of less value than set forth in the account.

The appellant did not deny under oath the debt sued for but simply claimed that he was entitled to have it reduced by a set-off which, we think, could not possibly be recovered, and it followed that there was nothing for the court to do but to award the peremptory instruction for appellee.

MAYES, J., delivered the opinion of the court.

On the face of the account it appears that appellant is entitled to a credit of the freight on the lumber. The court instructed the jury peremptorily to find for plaintiff. Since the credit was not made on the account, and it appearing by the admission of plaintiff on the face of it that appellant was entitled to a credit, the instruction was improper. We decide no other question in the case.

For this error the judgment is *reversed and remanded.*

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Brief for appellant.

LEWIS H. MAY v. THOMAS J. HUBBARD.

[49 Miss. 619.]

STALE CASE. *Decree dismissing. Should not adjudge merits.*

A decree dismissing a suit as being stale and for want of prosecution should not embody an adjudication confirming defendant's claim of title to the land in suit.

FROM the chancery court of Simpson county.

HON. JAMES L. MCCASKILL, Chancellor.

May, appellant, was complainant in the court below; Hubbard, appellee, was defendant there. From a decree in defendant's favor complainant appealed to the supreme court.

In July, 1906, appellant instituted this suit against appellee, averring in his bill that he owned certain land in the county; and prayed relief in respect to it.

Defendant demurred to the bill, and the cause was at the ensuing October term of chancery court taken under advisement by the court. The record does not show that any further action was taken on the demurrer. Subsequently in January, 1908, Hubbard answered the bill, denying all of its material averments. The answer was not made a cross-bill. At the subsequent October, 1908, term of the court, Hubbard moved to dismiss the case as being stale, since May had taken no action therein since the filing of the bill in July, 1906. The chancery court sustained the motion, dismissed the bill, and granted the defendant relief, confirming his claim of title to the land.

Flowers & Whitfield, for appellant.

It will be noted that the defendant did not set the cause for hearing on bill and answer; but instead he made a motion to dismiss the cause as being stale, since complainant had taken no steps in the cause subsequently to the filing of the bill. Now,

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Opinion of the court.

manifestly there was nothing for the complainant to do until answer should be filed. And only eight months elapsed from the time the answer was filed until the cause was dismissed as stale. Even if the procedure were proper, this is not such delay as would warrant the chancery court in treating the case as stale. Under our chancery procedure a complainant cannot be forced to an involuntary dismissal where there has been no default upon his part. *Ewing v. Glidwlel,* 3 How. (Miss.) 332; *Winston v. Miller,* 12 Smed. & M. 550.

But if we are mistaken in the contention that the court was not warranted in entering a decree of dismissal, it must still be held that the court below went beyond its province in confirming the title of defendant to the property in question. 6 Ency. Pl. & Pr., 919; 14 Cyc. 449, 450.

D. A. McIntosh & H. M. McIntosh, for appellee.

The court below was correct in dismissing the cause at the cost of complainant, and the decree should be sustained.

MAYES, J., delivered the opinion of the court.

The court was only warranted in this case in entering a judgment of dismissal. No other question was presented for decision, and no other judgment ought to have beee entered. The court however, not only entered a judgment dismissing the case on motion of the defendant for failure on part of complainant to prosecute the case, but went further, and confirmed the title of defendant to the property in question. This action of the court on this record was clearly without authority.

The action of the court is sustained in so far as it dismisses the cause of action, and reversed and decree here modifying the judgment in so far as it confirms defendant's title. The cost of appeal is taxed against appellee.

Reversed.

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SARAH TURNER v. STATE OF MISSISSIPPI.

[48 South. 409.]

CRIMINAL LAW AND PROCEDURE. *Improper argument. Character. Evidence. Failure to offer.*

It is improper in a criminal case for a prosecuting lawyer to comment in his argument to the jury upon defendant's failure to offer evidence of her previous character; and, proper objection being ineffectually made thereto, it is reversible error unless defendant's guilt be overwhelmingly shown.

FROM the circuit court of Harrison county.

HON. WILLIAM H. HARDY, Judge.

Madame Turner, appellant, was indicted and tried for the murder of one Joseph Turner, convicted of manslaughter, sentenced to the penitentiary for a term of three years, and appealed to the supreme court.

The opinion of the court sufficiently states the facts.

Evans & Hardy, for appellant.

The remarks of counsel for the prosecution, made in the argument before the jury, constituted reversible error. *Brown v. State,* 81 Miss. 143.

The appellant did not choose to introduce in evidence her good character, hence the state could not introduce evidence as to her character being bad. Greenleaf, Ev. (16th ed.), 39, § 14, b.

"It is prejudicial error entitling the defendant to be granted a new trial to allow counsel for the prosecution in his argument to the jury to comment upon the failure of the defendant to offer evidence of his previous good character." 12 Cyc. 578.

"Such argument, made over objection of defendant but with consent of the court, in effect destroys the presumption in favor of the accused, and allows the jury to infer that defendant's character is bad, because he has not produced proof to the con-

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trary. *McKnight v. United States,* 97 Fed. 208, 38 C. C. A. 115.

George Butler, assistant attorney-general, for appellee.,

The statement of learned counsel assisting in the prosecution was improper and unwarranted; but it should not work a reversal of the judgment below where, as shown by the whole record, the result of the trial was proper. Jurors are presumed to be men of intelligence and discretion. The presumption is not to be indulged that they are swept from their feet or unduly prejudiced by every side remark of counsel.

WHITFIELD, C. J., delivered the opinion of the court.

During the progress of the trial of this case, which is an exceedingly close one on its facts, special counsel employed to assist the district attorney in the prosecution, in the course of his argument to the jury, used the following language: "She says that she has witnesses to prove her good character. Why didn't old Sarah Turner bring her witnesses here to testify to her good character, if she has witnesses to prove her good character? The state cannot introduce evidence of her bad character until the defendant has put in her good character." To this the defendant then and there excepted. The court does not seem to have sustained the exception or to have directed counsel to stop that line of argument; nor did the court give a single instruction directing the jury not to regard this statement.

In 12 Cyc. 578, it is said: "So it is prejudicial error entitling the defendant to be granted a new trial to allow counsel for the prosecution in his argument to the jury to comment upon the failure of the defendant to offer evidence of his previous character." In *McKnight v. United States,* 97 Fed. 208, 38 C. C. A. 115, it is said: "Such argument made over objection with the consent of the court, in effect destroys the presumption in favor of the accused, and allows the jury to infer that his character is bad, because he has not produced proof to the contrary."

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Statement of the case.

To the same effect are many other authorities. Indeed, the proposition is elementary. We would not in a case where the right result had manifestly been reached, where guilt was overwhelmingly shown, reverse for this sort of error alone; but in this case the guilt is not so shown, and it is not at all clear from the testimony that the defendant is guilty of the crime charged.

Reversed and remanded.

MARY JONES v. DAVID S. JONES, EXECUTOR, ETC.

[49 South. 115.]

ESTATES OF DECEDENTS. *Wills. Renunciation by widow. Code* 1906, § 5089. *Commissioners to ascertain widow's interest. Executor may petition for. Parties.*

A petition for the appointment of commissioners to ascertain the share of the widow renouncing the will of her deceased husband, under Code 1906, § 5089, governing such cases, may be brought by the executor, all parties in interest including devisees and legatees as well as the widow being made defendants; but such a proceeding is premature if begun before it can be reasonably determined what part of the estate will be left for distribution after the payment of creditors.

FROM the chancery court of Leflore county.

HON. M. E. DENTON, Chancellor.

David S. Jones, executor of the will of Benjamin L. Jones, deceased, appellee, was camplainant in the court below; and Mrs. Mary V. Jones, widow of the said decedent, appellant, was defendant there. From a decree overruling the defendant's demurrer to the petition of the executor for the appointment of commissioners to ascertain the share of decedent's estate to which the widow who had renounced the will, was entitled, defendant appealed to the supreme court.

The opinion of the court states the facts.

Code 1906, § 5089, applicable to the case, is as follows: "In

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Statement of the case.

case the wife have a separate property at the time of the death of her husband, equal in value to what would be her lawful portion of her husband's real and personal estate, and he have made a will, she shall not be at liberty to signify her dissent to the will, or to renounce any provision or bequest therein in her favor, and elect to take her portion of his estate. But if her separate property be not equal in value to what would be the value of her portion of her husband's estate, then she may signify her dissent to the will, as in other cases provided by law, and claim to have the deficiency made up to her, notwithstanding the will; and the court in which the will is probated may appoint three commissioners to ascertain by valuation of the estate what her lawful portion thereof would be worth, and the commissioners shall also value her own separate estate, and report their valuation to the court, whereupon the court shall make the proper order for allowing her to share in her husband's real and personal estate to make up the deficiency after the following rule: If her separate property be equal in value to two-thirds of what she would be entitled to, she shall have one-third of her lawful portion of the land and one-third of what would be her distributive share of the personalty. If her separate property be worth half in value what she would be entitled to, then she shall be entitled to half her lawful portion of real estate and half of what would be her distributive share of the personalty. If her separate property be worth only one-third in value what she would be entitled to, then she shall be entitled to two-thirds of her lawful portion of real estate and two-thirds of what would be her distributive share in the personalty. But this section shall not preclude or prevent any married woman from renouncing the provisions of her husband's will, and electing to take her lawful portion, if her separate property do not amount in value to one-fifth of what she would be entitled to. This section shall apply to a husband renouncing the will of his wife, and shall govern as to his right to share in her estate in such case."

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Brief for appellant.

Gwin & Mounger, for appellant.

The demurrer of the appellant should have been sustained. The petition is filed by the executor alone. Under the will he has nothing whatever to do with the distribution of the estate. It passes to the devisees as tenants in common, and all the executor has to do with the estate is to see that the debts are paid and the property collected and preserved for proper distribution. Upon the renunciation of the will, the widow, the appellant, became a tenant in common with the devisees. The petition shows that the estate consists of large bodies of real estate and personal property. The only cause for appraisement at this time, as set forth in the appellee's petition, is the desirability of making arrangements for cultivating the lands next year. In this the executor can have no interest, whatever.

The devisees are not parties to the proceeding and will not be bound by the finding of the appraisers if appointed. The effort is to bind the widow, but leave the devisees free to institute other proceedings if they are dissatisfied with the appraisement. Code 1906, § 5089, is difficult to understand, but it is clear that the proceedings in which the value of the estate of the decedent is to be determined, and in which it is charged that the widow's separate property exceed in value one-fifth of what she would be entitled to," must be instituted, and this charge made, by someone who is interested in the outcome of the proceedings and such proceedings must bind all parties interested in the decedent's estate.

Upon the renunciation of the will by the widow the real estate of the decedent passed by law directly to the devisees and to the widow as tenants in common, subject to the rights of creditors of the decedent to have their debts paid therefrom, after the personal estate has been exhausted. The personal property passed to the executor for the purpose of paying the debts of the decedent and for preservation for subsequent distribution of the balance remaining after the debts are paid. The record shows that the statutory period of one year allowed

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to creditors in which to probate their claims has not expired. Until the time for the probate of claims against the estate has expired, it is impossible to determine how much decedent's debts amount to, or how much of the property will be required for the payment of these debts; and, therefore, until the expiration of this year, it is impossible for any commissioners to determine the value of the decedent's estate.

Coleman & McClurg, for appellee.

Code 1906, § 5089, is plain and unambiguous. When the will was renounced by appellant, it became the duty of the court below to appoint three commissioners to ascertain by valuation of the estate what her lawful portion thereof would be worth. The demurrer admits that the widow has a separate estate, more than one-fifth as large as that of her deceased husband, and she is entitled to have set apart to her not only a part of the real, but also of the personal estate of the decedent to make her estate equal in value to that of the decedent. The law is thus written, and nothing is said therein as to whose rights are affected or what notice, if any, shall be given to anyone. The chancery court, under Code 1906, § 554, can adjust and determine all such questions upon the coming in of the report of the commissioners.

The executor has sufficient interest in the estate to warrant his instituting this proceeding. Any person interested in the estate can institute proceedings under Code 1906, § 5089, to have commissioners appointed.

MAYES, J., delivered the opinion of the court.

Benjamin L. Jones died on the 13th day of August, 1908, leaving a last will and testament wherein David S. Jones was made executor without bond. The deceased having a fixed place of residence in Leflore county, the will was in due course admitted to probate in the chancery court of that county. The will was probated August 19, 1908. On October 24th follow-

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ing, the executor filed a petition in the chancery court of Leflore county, making Mary V. Jones, widow of Benjamin L. Jones, deceased, a party defendant. The will contained only the following reference to the wife; that is, it provided that "after the payment of all my just debts, as my wife has a separate estate very nearly, if not entirely equal to mine, I devise all of my estate, real and personal, etc., to my brothers and sisters, and their descendents, in equal parts," etc. In short, it made no provision for her because of the reason stated therein. The petition was filed by the executor October 24, 1908, and is a proceeding under Code of 1906, § 5089, and alleges that the widow renounced the will October 22, 1908, and thereupon became entitled to such share of her deceased husband's estate, real and personal, as she would have been entitled to if her husband had died intestate. It is further alleged that there were no children or descendants of children, and that the widow owns a large estate of real and personal property greatly in excess of one-fifth of the estate left by the decedent. It is further charged that the widow, by virtue of the renunciation of the will, is entitled to receive from her deceased husband's estate enough of same to make the value of her estate equal to his at the time of his death, and in order to ascertain this amount and make up the deficiency it is necessary that the court appoint three commissioners to ascertain the value of both estates and report their valuation to the court as the law provides. It is further alleged that this proceeding is necessary in order to enable the executor to proceed to execute the will. To this bill a demurrer was interposed by the defendant, setting up, first, that the executor has no such interest as would entitle him to bring this suit; second, that those named as devisees in the will are not made parties to the proceeding; and, third, because the petition is prematurely filed. This demurrer was overruled by the chancellor, and an appeal is prosecuted from the decree to settle the principle of the cause.

It will be noted, first, that the death of the testator occurred

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Opinion of the court.

August 13, 1908. The will was probated and allowed on the 19th of August, and this petition was filed on the 24th day of October, and before the expiration of the one year allowed for filing and probating claims. Under Code of 1906, § 2137, any proceeding which has for its object any distribution of the estate before the expiration of one year from the grant of letters testamentary is not permissible, and this petition must be dismissed as being premature, it having been filed before it can reasonably be determined what part of the estate will be left for distribution after the payment of creditors, but since the appeal is for the purpose of settling the principle of the cause, we will decide all the questions raised by the demurrer.

It is argued that the executor has no such interest in the estate as would warrant his instituting this proceeding. We do not think this position is sound. Any person interested in the estate, or connected with its administration under Code 1906, § 5089, may institue proceedings to have commissioners appointed as provided for in the section for the purpose of ascertaining the value of the estate of the wife, and to determine what her lawful portion of her husband's estate should be. But, while this is true, by whomsoever the proceedings may be instituted, it is necessary to make all interested persons parties to the proceeding.

Decree *reversed* and petition *dismissed.*

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Statement of the case.

HARRY HOYLE v. GEORGE W. SHIRLEY.

[49 South. 177]

PROMISSORY NOTES. *Failure of consideration.*

A failure of consideration is a good defense to a suit on a promissory note between an endorser, having no greater rights than a payee, and the maker, and defendant should not be unduly restrained in making it.

FROM the circuit court of Harrison county.

HON. WILLIAM H. HARDY, Judge.

Shirley, appellee, was plaintiff in the court below and Hoyle, appellant, and one Ladnier were defendants there. From a judgment in plaintiff's favor the defendant, Hoyle, appealed to the supreme court.

Hoyle, appellant, purchased the business of Ladnier who was engaged in operating a licensed dramshop in Gulfport, and gave his promissory note payable to Ladnier, to evidence the debt for the unpaid part of the purchase money. Ladnier assigned the note to Shirley, the appellee, and upon Hoyle's failure to pay it when due Shirley instituted this suit. Hoyle offered on the trial to show that at the time of the execution of the note and as a part of its consideration, Ladnier agreed to protect the dramshop business from all judgments which might be rendered against him, and warranted that there would be nothing to prevent the dramshop from remaining open until the license to operate the same should expire by limitation; and further agreed, that in the event he failed to protect the business, the note should be void; that Ladnier failed to protect the business as agreed, and as a result the dramshop was compulsorily closed more than three months before the expiration of the time for which the license was granted. On objection by plaintiff, the court declined to allow defendant to introduce testimony as offered.

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Brief for appellee.

The opinion of the court further states the facts.

J. L. Heiss, J. H. Mize and *R. C. Rowan,* for appellant.

The appellant offered to prove that Ladnier had promised to protect the business by paying off all judgments and debts for a specified time, and that Ladnier had failed to do so and hence the consideration for the note had failed. Appellant on the trial offered to show in evidence that judgments had been rendered which affected the business, and that Ladnier had failed to protect the business from such judgments and from other debts, in violation of his agreement. The court below, in holding such evidence to be incompetent, shut appellant off from showing the true consideraion of the note and how the same had failed. In other words the court declined to allow appellant to prove the facts on which his defense was based.

It is, of course, well settled that whatever defense Hoyle, the appellant, had against Ladnier existed also in appellant's favor against the appellee, Shirley.

Evans & Hardy, for appellee.

We think the court did not err in its ruling. Appellant's counsel asked "What was the contract between you and Ladnier at the time you executed the note sued on? Counsel for appellee objected to this question, whereupon the court below made inquiry: "Do you propose to show failure of consideration? Counsel for appellant replied in the affirmative, whereupon the court directed counsel for appellant to ask, not what the contract was, but "What was the consideration for which the notes were given?" Counsel for appellant objected to this, but the court overruled the objection, and, after exception by appellant to the question, witness answered, "It was for liquor and the business of the Union saloon owned by Ladnier." At this point, for reasons best known to opposing counsel, the question propounded was withdrawn. If such interrogatory and answer had been permitted by counsel for appellant to stand, then, un-

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der the express ruling of the court, appellant would have been not only permitted but advised to then show the failure of consideration which he might consider to be available under the circumstances.

It will be seen that the court below later gave appellant permission to show the true consideration for which the notes had been given. At no time did counsel for appellant state or intimate during the trial that it was necessary to detail the facts of the contract under which the notes were given in order to show the failure of consideration.

MAYES, J., delivered the opinion of the court.

It was perfectly competent for Hoyle to show that the consideration for the note given by him to Ladnier and by Ladnier assigned to plaintiff had failed. This Hoyle undertook to do, and his counsel offered to show that the consideration for which he executed the notes had failed; but we think, under the court's ruling, Hoyle was shut out from making this defense. It is true that his counsel asked, "What was the contract between you and Ladnier at the time you executed the note sued on?" Whereupon the court directed counsel to ask, not what the contract was, but "What was the consideration for which the note was given?" Counsel for Hoyle then stated that he proposed to show that the consideration failed, in that Ladnier had promised to protect the business which Hoyle had bought from him, and which constituted the consideration, by paying off all judgand debts for a specified time, and Ladnier failed to do this, and hence the consideration for the note failed. The plaintiff objected to this, and the court stated that he did not think the testimony offered by counsel was competent.

On reviewing the record, we think that the appellant was unduly restricted by the court in his effort to show a failure of consideration, and for this reason the judgment is *reversed* and cause *remanded*.

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Statement of the case.

GEORGE A. HOBBS ET AL. v. WILLIAM T. GERMANY ET AL.

[49 South. 515.]

1. PUBLIC SCHOOLS. *Equity. Injunction. Invalid school rule.*

Equity has jurisdiction to enjoin the trustees and teachers of a public school from enforcing an invalid rule.

2. SAME. *School officers. Code* 1906, §§ 4487, 4503. *Rules.*

Code 1906, § 4487, providing that the board of education shall decide all appeals from decisions of county school superintendents, and Code 1906, § 4503, providing that in all controversies arising under the school law the opinion of the superintendent shall be first sought and for appeals therefrom to the board of education, do not exempt school authorities, acting beyond the scope of their powers and in violation of law, from interference by the courts.

3. SAME. *Code* 1906, §§ 4525, 4623. *No control of pupils in their homes.*

Code 1906, § 4525, empowering trustees of public schools to prescribe and enforce rules for the government of schools and to suspend and expel pupils for misconduct, and Code 1906, § 4623, authorizing teachers to enforce such rules and hold pupils to account for disorderly conduct on the school premises and on the way to and from school, do not authorize the adoption of a rule requiring pupils to remain at home and study their lessons between designated hours in the evening.

FROM the chancery court of Lincoln county.

HON. G. GARLAND LYELL, Chancellor.

Germany and his infant son, Henry Germany, appellees, were complainants in the court below; Hobbs and another, teachers, and Vernon and others,—trustees of the separate school district of the town of Boguechitto, appellants, were defendants there. From a decree restraining the enforcement of a certain rule, regulating the hours of study for school children and providing that they should remain at home and study their lessons at night, and requiring defendants to reinstate the infant son,

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Brief for appellants.

Henry Germany, as a pupil in the school, defendants appealed to the supreme court.

The facts are fully stated in the opinion of the court.

Cassedy & Sumrall, and *J. N. Yawn,* for appellants.

This appeal involves the power of the public school authorities to make and enforce a rule that all pupils of the school shall remain in their homes and study, at night. The bill prayed for an injunction against the trustees and teachers to prevent the enforcement of this rule, and also prayed that they be required to reinstate young Germany in the school during the pendency of the suit. The answer admitted the adoption of the rule and its proposed enforcement. The chancellor retained the injunction against the school authorities, and from a decree to such effect this appeal is prosecuted.

The chancery court had no jurisdiction in this matter. Code 1906, § 4503, provides an inferior tribunal to settle controversies arising under the school law and also provides for an appeal from the advice of the county superintendent to the state board of education. Code 1906, § 4487, provides that the state board of education shall decide all such appeals. Sec. 203 of our state constitution of 1890 provides for a board of education not only for the management and investment of school funds but also "for the performance of such other duties as may be prescribed." And sec. 204 of the state constitution provides that there shall be a county superintendent of education whose duty shall be prescribed by law. The legislature had the authority under the constitution to create this special school tribunal and to refer to such tribunal the settlement of all controversy arising under the school law.

It is true that every citizen has the right to send his children to the public school of the state under certain conditions and restrictions. But in the exercise of such right he must conform to the rules laid down by the legislature or by the tribunal to which the legislature has delegated authority in the mattter. If

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the chancery court has been named as the tribunal for the exercise of such authority, the jurisdiction of such court would have been inclusive and unquestioned. But the legislature has, as shown above, expressly conferred exclusive authority upon the officers designated in Code 1906, § 4487–4503. Since the appellees did not avail themselves of this special tribunal, they can now have no standing in any court.

The powers and duties of the trustees are clearly set forth in Code 1906, § 4525. They have the undoubted authority to prescribe rules for the government of the schools in their district, and inasmuch as there is no question in this case as to whether the rules prescribed were inconsistent with those prescribed by the state board of education, the only other question presented naturally is whether the rule which they did prescribe was inconsistent with the law. Certainly the rule, which prescribed that all pupils of the school should remain in the home and study for two hours on the night of every school day, was not illegal in the sense that it was in conflict with the state constitution. The state, in providing a free school system, did so to enable the parent to perform his common law duty to educate his child, and the rules of the school are applicable to the parent as well as to the child. *Cartersville Board of Education v. Purse,* 101 Ga. 422. It is undoubted that the teachers and the board have jurisdiction over the pupil after school hours and in the interim of time between dismissal of the school and resumption of parental control. *Deskins v. Gose,* 85 Mo. 485. See also *Hutton v. State,* 23 Tex. Ct. App. 386; *Jones v. Cody* (Mich.), 62 L. R. A. 160; *Burdick v. Burdick,* 31 Ia. 562; *v. Seaver,* 32 Vt. 114.

At common law the presumption is that a rule of a board of school trustees is reasonable, and courts of law will not interfere with the enforcement thereof unless it is so palpably unreasonable as to be void. *Kinzer v. Toms,* 129 Ia. 441; *Wayland v. School Directors,* 7 L. R. A. (N. S.) 352; *Ferriter v. Tyler,* 48 Vt. 448.

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Brief for appellee.

P. Z. Jones, Jno. A. McNair, and *Luther L. Tyler,* for appellee.

The rule promulgated by the school authorities is illegal in that it seeks to usurp parental authority. *Gritt v. Snodgrass,* 66 Mo. 286. While a person who teaches a private school may say upon what terms he will receive the pupil and may, before receiving the pupil, demand that the parents shall surrender so much of his or her parental authority as not to allow the pupil during the term to attend social parties, balls or theatres except on pain of expulsion, this principle will not apply with regard to officers of public schools, since every child within the school age has a right, under the law, to attend the public school of his district. When the school room is entered by the pupil the authority of the parent ceases and that of the teacher begins, but when sent to his home the authority of the teacher ends and that of the parent resumes. Certainly neither teacher nor board of school trustees can have power or authority in law to adopt any rule governing the conduct of the pupil after the pupil enters the precincts of his own home and comes within the jurisdiction of parental control; with the exception as to some matters that are *per se* immoral and have a direct tendency to subvert and override the power of the teacher in the proper administration of school affairs.

The question of the reasonableness of the rule and regulation established by the school officers is one of law, to be decided by the courts. Mechem, Pub. Off. § 720; *Fertich v. Michener,* 111 Ind. 472, 60 Am. Rep. 709, 11 N. E. 605; *Kinzer v. Independent School Dist.* (*Kinzer v. Toms*), 129 Iowa, 441, 3 L. R. A. (N. S.) 496, 105 N. W. 686, 6 A. & E. Ann. Cas. 996; *Rodgers v. Independent School Dist.,* 100 Iowa, 321, 69 N. W. 544; *Perkins v. Independent School Dist.,* 56 Iowa, 476, 9 N. W. 356; *Kinkle v. Saddler,* 97 Iowa, 526, 66 N. W. 765; *Board of Liquidation v. McComb,* 92 U. S. 531, 23 L. Ed. 623; *Noble v. Union River Logging R. C.,* 147 U. S. 172, 37 L. Ed. 126, 13 Sup. Ct. Rep. 271; 16 Cyc. Law & Proc. p. 36, § 4.

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Opinion of the court.

A school rule must be not only reasonable within itself but its enforcement must also be reasonable in the light of circumstances. *Fertich v. Michener,* 111 Ind. 472.

As to the jurisdiction of the chancery court, we contend that the question of the reasonableness of the rule and of the scope of authority to be exercised by the school trustees and teachers of the separate school districts, is one of law, and reviewable in the courts of the land without resort to the quasi judicial tribunal established by Code 1906, §§ 4487, 4503. The rule is uniform that if a remedy at law after statutory enlargement remains incomplete or otherwise inadequate, jurisdiction of equity is not ousted. 16 Ciy. 36, § 4. 1 Story, Eq. § 76.

Although the jurisdiction of the county superintendent and state board of education may be not concurrent but exclusive, even then the remedy as provided is now full, adequate and complete for the purpose of this case. The restraining power of equity extends through the whole range of rights and duties recognized by law. If the legal remedy does not fully come up to the requisition of the case, the exercise of equity jurisdiction may be proper and beneficial. 5 Pom. Eq. Jur. § 263; *Mills v. New Orleans Seed Co.,* 65 Miss. 391; 4 South. 298, *Irwin v. Lewis,* 50 Miss. 363; 16 Cyc. 41.

MAYES, J., delivered the opinion of the court.

The town of Boguechitto composes a separate school district, and the appellants are trustees thereof and teachers therein. This controversy grows out of the attempted enforcement of a certain rule, adopted by the teachers of the school and ratified by the trustees, by which it is required that all pupils of the school shall remain in their homes and study from seven to nine p. m., and the rule provides that any pupil who shall violate it shall be punished, either corporally or otherwise, in the discretion of the teacher.

Henry Germany, a boy about sixteen years of age and living with his father in the town of Boguechitto, was attending

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this school. Some time during October, 1908, between the hours of seven and nine p. m., the father attended religious services held nearby in the town of Norfield, and took with him his son Henry, which the teachers considered a violation of the above rule. On the son's returning to school, the teachers, in pursuance of the purpose to enforce this rule, undertook to punish him for this breach of their rule, and gave him his choice of submitting to corporal punishment or confinement in the schoolroom for forty minutes during the noon hour for the period of five days. Under these facts, and being guilty of no other breach of the school law, young Germany refused to submit to either of the proposed punishments, whereupon the school authorities compelled him to withdraw from the public school. When this was done, the father, individually and the son, by the father as his next friend, began this suit in the chancery court, alleging that the adoption of the rule was beyond the lawful power of either the trustees or the teachers, and constitutes a usurpation of authority, not conferred upon them by law. The bill prayed for an injunction against the trustees and teachers enforcing this rule, and also prayed that they be required to reinstate young Germany in the school during the pendency of the suit and prohibited from inflicting any punishment because of his infraction of the rule. The answer admits the adoption of the rule and its proposed enforcement, and, the question being submitted to the chancellor on a motion to dissolve this injunction, the motion was overruled, and the injunction retained, from which judgment an appeal is prosecuted.

The sole question presented by the record is as to the power of the school authorities to make and enforce this rule. The first cotention is that the chancery court is without jurisdiction to entertain this proceeding, and Code 1906, § 4503, is cited as authority for this contention. That section is as follows: "In all controversies arising under the school law, the opinion and advice of the county superintendent shall first be sought, from whose decision an appeal may be taken to the state

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board of education upon a written statement of the facts, certified by the county superintendent or by the secretary of the trustees." And again Code 1906, § 4487, provides: "The board of education shall decide all appeals from decisions of county superintendents, or from the decisions of the state superintendent; but all matters relating to appeals shall be presented in writing, and the board's decision shall be final." It is argued that under these two sections all controversies which in any way involve any question connected with the government of the schools must be first submitted to the county superintendent, and from his decision an appeal can be taken to the state board of education; but, where the state board of education decides it, the decision is final. And, say counsel for appellant, since the legislature has provided this exclusive forum to settle all school controversies, and the appellees have not availed themselves of this forum, they have no standing in any court.

This argument may be sound when applied to any controversy arising over any matter coming within the scope of the powers delegated by law to the school authorities; but the school authorities are not exempted from a supervision by the courts by virtue of sections 4503 and 4487 of the Code of 1906, constituting the county superintendent and the state board of education the arbiters of controversies arising under the school law, in any case where the school authorities are acting beyond the scope of their power and in violation of law. Whenever a question arises as to whether or not the power of the school authorities to make a certain rule or regulation is reasonably within the scope of the power conferred on them by law, the question is undoubtedly subject to inquiry by the courts. This was expressly held in the case of *Kinzer v. Toms,* 129 Iowa, 441, 105 N. W. 686, 3 L. R. A. (N. S.) 496, and in that case the court was construing a statute very similar to the provision of the statute now under consideration. Many other authorities to the same effect are cited in the brief of counsel for appellee, to which we here refer. In the case of *Perkins v. School District,* 56 Iowa, 476, 9 N. W. 356,

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where the statute provided that in any controversy with the school directors an appeal should be taken to the county superintendent, and thence to the superintendent of public instruction, where a controversy arose as to the power of the school directors to make a certain order, the court said: "The courts of the state are the arbiters of all questions involving the construction of the statutes conferring authority upon officers and jurisdiction upon special tribunals. It was certainly never the intention of the legislature to confer upon school boards, superintendents of schools, or other officers discharging *quasi* judicial functions, exclusive authority to decide questions pertaining to their jurisdiction and the extent of their power. All such questions may be determined in the courts of the state. Hence, when the rights of a citizen are involved in the exercise of authority by a school officer, the courts may determine whether such authority was lawfully exercised."

We are not concerned in this case with what powers the legislature of the state may confer upon trustees and teachers of public schools; but we are now only concerned with the powers which it has conferred upon them. As to the trustees, their powers and duties are clearly pointed out in Code 1906, § 4525, which are: "(a) To prescribe and enforce rules, not inconsistent with law or those prescribed by the state board of education, for their own government and government of schools," etc. "(f) To suspend and expel pupils for misconduct." By these sections it is seen that the trustees have a limited, and not absolute, authority in making and enforcing rules for the government of the schools, and the teachers' authority in this particular is narrower than is that of the trustees. The trustees can make and enforce no rule inconsistent with the law. The power to do this is expressly prohibited in paragraph "a," § 4525 of the Code of 1906. Certainly a rule of the school, which invades the home and wrests from the parent his right to control his child around his own hearthstone, is inconsistent with any law that has yet governed the parent in this state, and the writer of this opinion dares hope

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that it will be inconsistent with any law that will ever operate here so long as liberty lasts, and children are taught to revere and look up to their parents. In the home the parental authority is and should be supreme, and it is a misguided zeal that attempts to wrest it from them. By Code 1906, § 4623, the teachers are given authority "to enforce the rules and regulations prescribed for schools, and to hold pupils to a strict account for disorderly conduct on the way to and from school, on the playgrounds, or during recess, and suspend, for good cause, any pupil from school, and report such suspension to the board of trustees for review," etc. These sections contain all the power the legislature has seen fit to give to the trustees or teachers. It may not be easy to say with exact precision what rules may or may not be adopted and enforced by the school authorities for the government of a school. With the general powers we are not here concerned. We are simply called upon to decide this concrete case, and unhesitatingly say that the rule attempted to be enforced is a nullity and beyond the power of the trustees to adopt or the teachers to enforce.

The case of *Dritt v. Snodgrass,* 66 Mo. 286, 27 Am. Rep. 343, is an authority very much in point here. In that case the school directors adopted a rule prohibiting pupils from attending social gatherings, and the court said: "The directors of a school district are invested with the power and authority to make and execute all needful rules and regulations for the government, management, and control of such shcool as they may think proper, not inconsistent with the laws of the land. Under the power thus conferred, the directors are not authorized to prescribe a rule which undertakes to regulate the conduct of the children within the district, who have a right to attend the school, after they are dismissed from it and remitted to the custody and care of the parent or guardian. They have the unquestioned right to make needful rules for the control of the pupils while at school, and under the charge of the person or persons who teach it, and it would be the duty of the teacher to

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enforce such rules, when made. While in the teacher's charge, the parent would have no right to invade the schoolroom and interfere with him in its management. On the other hand, when the pupil is released and sent back to its home, neither the teachers nor directors have the authority to follow him thither, and govern his conduct while under the parental eye. It certainly could not have been the design of the legislature to take from the parent the control of his child while not at school, and invest it in a board of directors and teachers of a school. If they can prescribe a rule which denies to the parent the right to allow a child to attend a social gathering, except upon pain of expulsion from a school which the law gives him the right to attend, may they not prescribe a rule which would forbid the parent from allowing the child from attending a particular church, or any church at all, and thus step *in loco parentis* and supersede entirely parental authority? For offenses committed by the scholar while at school he is amenable to the laws of the school; but under the charge of the parent or guardian he is answerable alone to him. A person teaching a private school may say upon what terms he or she will accept scholars, and may demand, before receiving a scholar to be taught, that the parents shall surrender so much of his or her parental authority as not to allow the scholar during the term to attend social parties, balls, theaters, etc., except on pain of expulsion. This would be a matter of contract, and no one has a right to send a scholar to such a school except on the terms prescribed by those who teach it. This is not so in regard to public schools, which every child within school age has a right, under the law, to attend, subject, while so attending, to be governed by such needful rules as may be prescribed. When the schoolroom is entered by the pupil, the authority of the parent ceases, and that of the teacher begins. When sent to his home, the authority of the teacher ends, and that of the parent is resumed. For his conduct when at school he may be punished, or even expelled, under proper circumstances. For his conduct when at home, he is subject to

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domestic control. The directors, in prescribing the rule that scholars who attend a social party should be expelled from school, went beyond their power and invaded the right of the parent to govern the conduct of his child when solely under his charge."

It may be that the school authorities would have a right to make certain regulations and rules for the good government of the school, which would extend and control the child even when it has reached its home; but, if that power exists, it can only be done in matters which would *per se* have a direct and pernicious effect on the moral tone of the school, or have a tendency to subvert and destroy the proper administration of school affairs. We shall not undertake in this opinion, to say in what such things shall consist in order to justify a regulation of the school that may reach in the home and have its effect there. When such a case comes before the court, it will be time enough to decide how far this authority may be extended.

The distinguished chancellor was eminently correct in the decree establishing the supremacy of the mother and father in their own home as regards the control of their children, thereby sustaining the injunction, reinstating young Germany in the school, and declaring the regulation a nullity.

Affirmed.

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Brief for appellant.

WALTER COOPER v. STATE OF MISSISSIPPI.

[49 South. 178.]

CRIMINAL LAW AND PROCEDURE. *Witnesses. Impeachment. Contradiction. Immaterial matter.*

A witness cannot be contradicted upon an immaterial and collateral matter.

FROM the Circuit Court of Webster County.

HON. GEORGE MCLEAN, Judge.

Cooper, appellant, was indicted and tried for the murder of one Hightower, convicted, sentenced to the penitentiary for life, and appealed to the supreme court.

The opinion of the court states the facts.

Gould & McKeigney, for appellant.

It was a manifestly reversible error to permit Riley Cooper, father of and a most important witness for appellant, to be cross-examined as shown in the record. The witness had denied making the statement about which he was interrogated, and thereupon the state was permitted in rebuttal, over appellant's objections, to prove by a witness, Harrison, that Riley Cooper had made the statement in question. The testimony was incompetent, and its only effect was the attempting to impeach a most important witness for appellant, and to impeach him upon a matter entirely immaterial to the great issue of innocence or guilt of appellant involved. *Williams v. State,* 73 Miss. 320, 19 South. 826; *Dunk v. State,* 76 Miss. 515, 25 South. 363; *Davis v. State,* 37 South. 1018; *Bell v. State,* 38 South. 796.

Although the appellant had, through the testimony of the eye-witnesses of the difficulty, proved his innocence of the crime charged, he was made to assume the burden of disproving a statement placed before the jury through incompetent testimony. The statement was not anything which appellant himself said,

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Brief for appellant.

but it was what another witness testifying for him, is alleged, by a third witness, to have said, it will be noted that the witness for appellant, Riley Cooper, denied the statement, and the state was allowed to place upon the witness-stand its witness, Harrison, to show, not what appellant said, but what Riley Cooper had said beyond the hearing of appellant and in appellant's absence.

If a trial court can permit a witness to be impeached upon collateral and immaterial matters, a cloud or suspicion is cast upon the testimony of such witness which cannot be sanctioned by law in criminal cases, since the weight of the testimony of such witness is thereby lessened in an improper and illegal matter. As stated by the court in *Simms v. Forbes,* 86 Miss. 412, 32 South. 546, "the rule against hearsay would be of but little value if it could be evaded by the transparent device of introducing it in contradiction of the adversary's witness upon collateral matters. Unless a party has the right to offer a conversation or statement directly, he cannot get it before the jury merely by way of contradicting a witness on matters brought out in cross examination."

Daniel & Adams on the same side.

It was error for the state to impeach the witness, Riley Cooper, by attempting to show that such witness made certain immaterial statements, after the witness had denied on cross-examination that he made such statement. This was a trial, not of Riley Cooper, the witness, but was a trial of the son, Walter Cooper, upon a capital charge. Every right of the appellant should have been carefully preserved by the court. The statement about which the witness was interrogated, was immaterial, collateral to the issue. The cases of *Williams v. State,* 73 Miss. 820, 19 South. 326, and *Bell v. State,* 33 South. 796, and other cases cited thereunder, show the error of the court below in respect to this. When we consider the fact that the witness, Riley Cooper, was, with the exception of appellant, the only eye witness to the whole difficulty, and that he was the principal and

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most material witness for appellant on the trial, and that he was also the father of appellant, it is evident how much weight the jury would naturally give to the testimony of such witness. If then his credibility was illegally attacked, the injury to appellant was most serious and, under the circumstances, the judgment must be reversed and the cause remanded. *Garner v. State,* 76 Miss. 515, 25 South. 363.

George Butler, assistant attorney general, for appellee:

We are aware of the decisions of this court cited by learned counsel for appellant, and we recognize their correctness. But inasmuch as the whole record, including the testimony of the witness, Riley Cooper, showed that appellant was most certainly guilty of a brutal and cold-blooded murder, the action of the district attorney in attempting to impeach such witness in the method shown should not make the judgment reversible. If the case were a very close one upon the facts a reversal might be advisable.

Argued orally by *L. M. Adams,* for appellant, and by *George Butler,* assistant attorney-general for appellee.

FLETCHER, J., delivered the opinion of the court.

The prinmipal witness testifying on behalf of the appellant was Riley Cooper, the defendant's father. On his cross-examination the state was permitted to ask him the following question: "Going back to what I asked you about George Harrison, I want to change that and ask you this: Didn't George Harrison come down in your field before the killing occurred on Tuesday, and ask you if you had heard about the mess Walter Cooper had been telling about Sam Hightower's wife, and didn't you tell him, 'Yes,' you had heard it, and didn't he say then that he wanted his name taken out of it, that he was going to see Walter Cooper and get him to take his name out of it, and he didn't want Walter Cooper to be coming on his premises with his shot-

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gun. Then didn't you say to him that he hadn't better say anything to Walter Cooper about it, that he (Walter) would kill him and the Hightowers, too, that he was already pretty mad about this thing, and any man that would tell another man what Walter had told Sam Hightower, he would kill any man?" The witness denied having made these statements, and thereupon the state was permitted in rebuttal, over the earnest objection of appellant, to prove by George Harrison that this conversation had taken place. It is perfectly obvious that this testimony was incompetent, since its only effect was to impeach the defendant's most important witness upon a matter which was entirely immaterial and collateral. Nothing is better settled than that such an impeachment is improper. *Williams v. State,* 73 Miss. 820, 19 South. 826; *Garner v. State,* 76 Miss. 515, 25 South. 363; *Bell v. State* (Miss.), 38 South. 796.

It is insisted on behalf of the state, however, that in spite of this error the case should be affirmed, because appellant is overwhelmingly shown to be guilty of murder. We think the case sufficiently close on the facts to make it important that a grave error of law, such as we have indicated, should not be disregarded by this court. We are not to be understood as expressing any opinion upon the value of the testimony; but we are not satisfied that appellant's guilt has been demonstrated with such overwhelming clearness as to warrant us in disregarding an error which runs counter to a well-settled principle of law.

Reversed and remanded.

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Statement of the case.

GULF & SHIP ISLAND RAILROAD COMPANY ET AL. v. VIRGINIA M. BARNES ET AL.

[48 South. 823.]

1. RAILROADS. *Crossings. Interlocking device. Code* 1906, § 4896. *Duty of companies. Contributory negligence. Imputed negligence. Passengers. Servants.*

Where an interlocking device was maintained by two railroad companies at a crossing of their tracks, authorizing them under Code 1906, § 4896, regulating the subject, to run trains over the crossing without stopping:—

(*a*) Both companies are under duty to the public to keep the device in order;

(*b*) Both are liable to the passengers of either for injuries resulting from the defective condition of the device; and

(*c*) The negligence of one of the companies in failing to keep the device in order does not preclude its servants, or their legal representatives, from maintaining suits against the other company for damages, or death, resulting from the defective condition of the device.

2. EQUITY. *Jurisdiction. Multiplicity of suits. Defenses. Legal questions. Facts.*

A bill in equity does not lie to prevent a multiplicity of suits unless the same legal questions and practically the same facts are involved in the suits the separate prosecutions of which are sought to be restrained; and the complainant must have a good, legal or equitable, defense to them.

FROM the chancery court of Forrest county.

HON. THADDEUS A. WOOD, Chancellor.

The Gulf & Ship Island Railroad Company, one of the appellants, was complainant in the court below, Virginia M. Barnes and others, appellees, and the Mobile, Jackson & Kansas City Railroad Company, an appellant, were defendants there. The latter railroad company made its answer a cross-bill against the Gulf & Ship Island Railroad Company and the appellees. From

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Brief for appellants.

a decree adverse to the two railroad companies they both appealed to the supreme court.

The opinion of the court states the facts.

N. C. Hill, for appellants.

The facts admitted by the pleadings show that a collision occurred between the trains of the two railroad companies at a railway crossing, and that the engineer of one train was killed, his fireman seriously injured and two passengers were more or less seriously hurt; and, in addition, an engine of one of the railway companies was seriously damaged. There are three actions at law pending against the two railroad companies, instituted by Mrs. Barnes, the window of the deceased engineer, one action being against the Gulf & Ship Island Railroad company for seventy-five thousand dollars, and one against the Mobile, Jackson & Kansas City Railroad Company for seventy-five thousand dollars and one against both of these railroad companies jointly for seventy-five thousand dollars. There are three other actions at law now pending, instituted by John Goldsby, the injured fireman, for his alleged damage, one action being against the Gulf & Ship Island Railroad Company for ten thousand dollars, one against the Mobile, Jackson & Kansas City Railroad company for ten thousand dollars, and one against both companies jointly for ten thousand dollars. There are two actions at law pending wherein Mrs. Maggie Gilbert claims twenty thousand dollars damage, one being in Harrison county circuit court against the Gulf & Ship Island Railroad company, and one in the circuit court of Greene county against the Mobile, Jackson & Kansas City Railroad company. And, in addition, there is one action at law pending against the two railroad companies, in the circuit court of Jones county, instituted by L. W. Youmans for two thousand dollars damages. There are thus several actions at law pending wherein large damages are claimed, and each of these actions at law is predicated of precisely the same statement of facts: namely, the collision between two trains of the different railroad companies occuring in July, 1907.

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Brief for appellants.

The facts necessary to establish all the defenses to all these actions at law are precisely the same; the only possible difference that could exist would be a difference as to the liability of the railroad company as concerns the employees and as concerns passengers. The law governing all of these cases is the same. It is difficult to conceive a situation more clearly within the rules authorizing chancery to take jurisdiction to prevent a multiplicity of suits, than the one at bar.

If equity refuses to intervene in this cause then there must necessarily be long and expensive litigations on the part of both railroad companies in determining the various actions at law brought against them. *Pollock v. Okolona Savings Bank,* 61 Miss. 294; *Illinois, etc., Railroad Co. v. Garrison,* 81 Miss. 257, 32 South. 996; *Hightower et al. v. Mobile, etc., Railroad Co.,* 83 Miss. 708, 36 South. 82; *Thames v. Mangum,* 87 Miss. 575, 40 South. 327; *Whitlock v. Yazoo, etc., Railroad Co.,* 91 Miss. 779, 45 South. 861; *Tisdale v. Insurance Companies,* 84 Miss. 709, 36 South. 568; *Williams v. City of Jackson,* 82 Miss. 301, 46 South. 551; *Butler v. Scottish, etc., Co.,* 93 Miss. 215; 46 South. 829.

On the question of "community of interest" this court has held that where a common state of facts and a common principle of law are involved equity will assume jurisdiction and prevent a multiplicity of suits. *Pollock v. Okolona Savings Bank,* 61 Miss. 294; *Crawford v. Mobile, etc., Railroad Co.,* 83 Miss. 708, 36 South. 82. See also *Pomeroy Eq. Jur.,* §§ 244, 274.

In *Thames v. Mangrum,* 87 Miss. 575, 40 South. 327, this court in holding that it was necessary for equity to take jurisdiction in order to prevent a multiplicity of suits, said: "It is a well established rule in this state that in many different classes of suits, equity will not refuse to settle in one suit all matters at issue, even though the various defendants may have different interests or interpose various defenses. All matters in dispute may be litigated in one proceeding, so that the ultimate decision of one suit will obviate all necessity of instituting and prosecut-

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ing many different actions at law. In this case, the right of plainants as against all the defendants, arises from one and the same state of facts. It is in just such a case, that the wisdom of the rule permitting equity to assume general jurisdiction, is most apparent."

In *Illinois, etc., Railroad Co. v. Garrison,* 81 Miss. 257, 32 South. 996, jurisdiction in equity was upheld in a case of multiplicity of suits, and the case of *Pollock v. Okolona Savings Bank Co.,* 61 Miss. 293, was quoted and approved, as was also the case of *Insurance Co. v. Van Cleave,* 191 Ill. 410. A reference to this Illinois decision shows that there was no community of interest between the parties complainant other than a community of interest in the law and facts. The action was based upon an allegation filed by sundry insurance companies that they had paid under protest two per cent of their earnings as a tax, which was illegal, and they jointly sued the state insurance commissioner for a return of the tax, and the Illinois court held that equity had jurisdiction in order to prevent a multiplicity of suits; the law and facts being applicable to all alike.

The case of *Whitlock v. Yazoo, etc., Railroad Co.,* 91 Miss. 779, 45 South. 861, put this matter, however, beyond dispute. In that case a number of persons had bought round-trip excursion tickets from the city of Vicksburg and being duly delayed in returning, brought actions at law in the circuit court, claiming actual and punitive damages, whereupon the railroad company filed its bill in the chancery court, alleging that the law and facts in all the cases were similar, and asking for an injunction against the prosecution of them at law and that chancery settle all of the controversies in one suit, to this bill a demurrer was filed, the grounds of which were almost identical with the grounds in the case at bar, and certainly raising the same questions that are raised here. In that case, WHITFIELD, C. J., said: "It is clearly and thoroughly settled by the best considered modern decisions in this state and elsewhere, that such jurisdiction exists in all cases of this character," citing *Railroad Co. v.*

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Brief for appellants.

Garrison; Crawford v. Mobile, etc., Railroad Co.; Pollock v. Okolona Savings Bank. In *Railroad Co. v. Garrison,* 81 Miss. 257, 32 South. 996, the court referred to and approved the case of *Woodward v. Seely,* 50 Am. Dec. 451, and especially, referred to pages 452 and 453, 50 Am. Dec. where it is held, that "community of interest" other than a similarity of law and facts, is not necessary for chancery jurisdiction to avoid multiplicity of suits.

James H. Neville and R. L. Dent, on the same side.

The law governing each of the cases here concerned is the same, and in all of the cases the same rules of procedure must be applied. It is true that Barnes and Goldsby were employes of the Mobile, Jackson and Kansas City Railroad Company, but they held no such relationship towards the Gulf and Ship Island Railroad Company. The other plaintiffs were passengers of the Mobile, Jackson and Kansas City Railroad Company, but the Gulf and Ship Island Railroad Company sustained no such relation to them. The same rules of law which determine the liability of the Gulf and Ship Island Railroad Company to the representatives of the engineer of the Mobile, Jackson and Kansas City Railroad Company, will determine the liability of the Gulf and Ship Island Railroad Company to Youmans and to Gilbert, and here we have as to all of them a community of interest and a similarity of law and facts, and this court has held that community of interest, other than similarity of law and facts, is not necessary to maintain an injunction to prevent a multiplicity of suits.

The bill and the supplemental bills filed in this chancery suit allege the insolvency of all the parties defendant save the Mobile, Jackson and Kansas City Railroad Company. The court is here presented with this state of facts; several suits for large sums of money are severally pending against the appellants, all instituted by insolvent plaintiffs; all to be determined on the same state of facts and by the same questions of law, and it does seem that this mere statement is sufficient to warrant a

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reversal of the decree of the court below in dissolving the injunction and awarding damages against appellant.

The case of *Railroad Co. v. Garrison,* 81 Miss. 257, 32 South. 996; is in point. The Illinois Central Railroad Company filed a bill in chancery against Garrison and six others who had instituted their separate actions against the railroad company in the court of a justice of the peace. The allegations of the company's bill showed that it was filed to prevent a multiplicity of suits and to prevent threatened suits by persons pecuniarily irresponsible. The supreme court, through the learned chief justice, in that case declared that the jurisdiction of the chancery court was too well settled to be doubted; that it should convene all these parties in one suit and determine therein the single question on which liability, past, present and future depended, so as to prevent endless multiplicity of suits with their attendant and useless consumption of time and cost.

In the case of *Crawford v. Railroad Co.,* 83 Miss. 708, 36 South. 82, the decree of the chancellor in dissolving an injunction was reversed; the supreme court declaring that the equitable jurisdiction to grant relief prayed for in the bill, on the sole ground that it would prevent a multiplicity of suits is clearly established.

Whatever question may arise between the Mobile, Jackson and Kansas City Railroad Company and the appellees as to its liability, such question can never arise with reference to the liability of the Gulf and Ship Island Railroad Company, for this latter company owed no duty to any of the appellees as employer or carrier. We insist that the position taken by this court in the cases of *Whitlock v. Railroad Co., Garrison v. Railroad Co.* and *Crawford v. Railroad Co.,* is in keeping with the trend of modern decisions, is wise, and is a correct intrepretation of the law, and, unless these decisions are to be overruled we confidently insist that the decree of the court below in the case at bar must be reversed and this cause remanded to the chancery court to be proceeded with to a final determination.

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Flowers & Whitfield, on the same side.

It must be conceded that the case of *Tribette v. Illinois Central R. R. Co.,* 70 Miss. 182, 12 South. 32, has been overruled. In that case CAMPBELL J., held that jurisdiction could not be maintained by a court of equity unless there was some kind of equitable jurisdiction other than the prevention of a multiplicity of suits; that it is not sufficient to show that all the cases arise out of the same transaction and depend upon the same questions of law and the same questions of fact. It was really held in that case that the cases consolidated by the chancery proceedings must be such as could have been instituted in that court originally. Chancery jurisdiction under the *Tribbett case* could only be invoked for the purpose of consolidating suits all of which might have been brought in that court in the first instance. Under that decision the chancery jurisdiction could not have been maintained in the *Crawford case* nor in the *Garrison, Tisdale* and *Whitlock cases.* All of these subsequent decisions are in conflict with the holding in the *Tribette case.* And the *Tribette* case if allowed to stand would have overturned the rule followed in the case of *Pollock v. Okolona Savings Bank,* 61 Miss. 293.

Our court is now firmly committed to the doctrine that the jurisdiction of the chancery court is ample to entertain a bill whose purpose is to consolidate several causes pending in a court of law, on the ground that the causes of action arise out of the same event and involve a common state of facts and a common principle of law. It is not essential that there be any community of interest in the subject-matter in the litigation. The parties may be suing each independently of the others. One of the litigants may have no interest in the result of the litigation as to any other litigant. There may be no equity involved or contended for to warrant the chancery court in taking jurisdiction except that the case depend upon a common state of facts and a common principle of law.

In the case at bar it appears that all the suits at law grow out of the same event. There was a collision between two trains at

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the crossing of two railroads. Each suit in the circuit court grew out of this happening. The one question of fact involved is: Which company is to blame for the collision, the Gulf and Ship Island Railroad Company, or the Mobile, Jackson & Kansas City Railroad Company? No doubt can be entertained that one of these companies is to blame. One of them is liable. The question of fact to be answered in each case is: Which of the two is liable? There will be little difficulty as to further procedure, after this question is determined. This is the vital issue in every case. The testimony necessary to be adduced will have for its purpose the fixing of liability upon one or the other of these railroad companies. This evidence will have to be heard in the trial of each case. It is the trial of this question, common to all the cases, which would consume the time of the circuit court and of the litigants and would run up a heavy cost-bill in each case. It is contended by learned counsel for appellees that different defenses could be made by defendants to the different suits at law brought in the circuit court; and it is contended that the law is not the same in all of the cases at law; that, as to the claim of Mrs. Barnes, contributary negligence on the part of the deceased might be pleaded; that as between the two railroad companies there is a contract which would have to be considered but which would be immaterial in the trial of the other cases. Counsel for appellees fail however to point out any differences as to the question of law involved except as between the two railroad companies and as between Barnes and the two railroad companies. In other words, it must be conceded by opposing counsel that, as to Goldsby, Gilbert and Youmans there is a common state of facts and a common principle of law. As to these three we have both the essentials of chancery jurisdiction. Even under the argument of counsel for appellees, the chancery court has jurisdiction to entertain this bill in so far as these three litigants are concerned.

If chancery courts are to assume jurisdiction to prevent multiplicity of suits where it appears that the several actions at law

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are based upon a common state of facts and a common principle of law, it necessarily follows that such court, in deciding whether jurisdiction will be taken, cannot look ahead and figure out what defenses may possibly be available. The court will not, when asked to take jurisdiction, decide whether the defenses are all alike, but will only consider whether the claims are based upon the same principle of law and the same state of facts. This is as far as any court can go. If it is necessary to go further, then the court might assume jurisdiction and afterwards discover, when different defenses were made, that it had no jurisdiction. In the *Whitlock case* we do not understand that at the time the the chancery court assumed jurisdiction it was well known what defenses would be made. If the rule contended for by appellees is sound, then there are very few situations similar to this which can be determined by a chancery court. Whenever its jurisdiction is invoked to prevent a multiplicity of suits it would be necessary for the chancery court to be advised fully and finally not only as to the facts and the law upon which each claim is based, but also as to what defenses are expected to be made to the suits. And the party invoking chancery jurisdiction would be bound by his statement as to what defense is proposed by him to each claim. If he should make a mistake in this regard, and, as the trial progressed, other defenses should develop, he could not under such theory avail himself of them, because it would oust the chancery court of jurisdiction. *Illinois Central Railroad Company v. Schroeder,* 113 N. W. 51.

We insist that the rule, as asserted and supported by Pomeroy and by this court, only requires the complainant to show that the basis of the several claims is the same; that if it appears, from the original complaints filed, that they depend upon a common state of facts and a common principle of law, then they may be consolidated in a court of chancery. The chancellor is called upon to look no further; does not have to be informed in advance of the defenses; does not have to require all the pleadings to be framed and the issues made up. No two cases are exactly

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alike. The purpose of the law is to furnish a remedy by which time and money may be saved in the trial together of several cases whose merits are substantially the same.

It is contended by learned counsel for appellee that Mrs. Gilbert was never made a party, and that certain of the writs were not served on all the parties against whom they were prayed to be issued, and that none of the defendants appeared at such proceedings except Mrs. Virginia M. Barnes and John Goldsby. It will be noted however that these grounds were not made in the court below, hence this court will not consider such contensions of appellee now.

The circumstances of this case present another ground of equitable jurisdiction besides multiplicity of suits. It is made clearly to appear by these bills and exhibits that the principal controversy in this litigation is whether the Mobile, Jackson & Kansas City Railroad Company or the Gulf & Ship Island Railroad Company is liable. The attorneys for Mrs. Barnes have instituted separate suits, one against these companies together and one against each of them severally. As we have already stated above, there will be little difficulty in the trial of any of these cases after the court has adjudicated which of the two railroads is responsible for the accident. It seems that plaintiffs at law do not know. They have tried to avoid the results of any mistake in this regard by suing the companies separately and also jointly. Now, Mrs. Barnes herself could have invoked the jurisdiction of the chancery court in the first instance. She has three suits. Her own cases reach the "multiplicity mark." There is an equity in her cases which gave her the right to file a bill in chancery in the first instance. This is also true of Youmans and Gilbert. They have sued both companies. They do not know which is liable. They and Mrs. Barnes could have gone into the chancery court in the first instances, and made their showing that one or the other of these two railroad companies is to blame for the accident; that they do not know which is guilty; that they cannot prosecute their claim to effect with-

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out having the two defendants brought into court, and compelled to interplead and show upon which responsibility rests. See *Lauderdale County v. Alford,* 65 Miss. 63, 3 South. 243, and authorities there cited.

Campbell & Campbell, for appellees.

The decree of the court below must be affirmed for the reason that Mrs. Gilbert was never made a party defendant and for the additional reason that certain of the writs were not served on all. Furthermore, none of the appellees appeared to the said proceedings except Mrs. Barnes and John Goldsby who presented demurrers and motions to dissolve the injunction against them.

Prevention of multiplicity of suits is not, of itself alone, an independent source or occasion of equity jurisdiction in such a sense that it can create a cause of action where none otherwise existed. In other words, a court of equity cannot exercise jurisdiction for the purpose of preventing a multiplicity of suits in cases where the complainant invoking such jurisdiction has not any prior existing cause of action, either equitable or legal. The very object of preventing a multiplicity of suits assumes that there are relations between the parties out of which other litigations of some form might arise. 1 Pomeroy Eq. Jur. 365; *Roland v. Hull,* 92 Md. 301; *Purdy v. Manhattan Railroad Co.* 13 N. Y. Supp. 295; *Storrs v. Pensacola Railroad Co.,* 29 Fla. 617, 11 South. 226; *Turner v. Mobile,* 135 Ala. 73, 33 South. 133.

The decisions cited by learned counsel for appellants to sustain their contentions, are not in point. In equity jurisdiction it is necessary that the defenses in an action of law should all be governed by the same principle of law and be predicated of practically the same facts. *Southern Steel Co. v. Hopkins,* 47 South. 274; 1 High on Injunctions (4th ed.) § 34; *Pritchard v. Norton,* 106 U. S. 125; *Hale v. Allinson,* 188 U. S. 77; *Alleghany, etc., Railroad Co. v. Weidenfeld,* 25 N. Y. Supp. 71.

Inasmuch as an interlocking device was maintained by the

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Brief for appellees.

two railroad companies at the crossing of their tracks, it was their continuous duty to the public to keep the device constantly in order. Code 1906, § 4896.

The declarations of Mrs. Barnes and John Goldsby allege that the railroad companies' tracks crossed at grade and that the interlocking device had been established, and that at the time of the collision and for sometime prior thereto it was not in working order, and was spiked down, but that this fact was not known to engineer Barnes. The declarations further charge that the Mobile, etc., Railroad Company had obtained the consent of the railroad commission to run over the crossing without stopping, which fact was known to engineer Barnes, and that on this account he was accustomed to run over the said crossing without stopping, but that the Gulf & Ship Island Railroad company did not have such permission. If the negligence of the Mobile, Jackson & Kansas City Railroad Company as to this would prevent recovery from the other railroad company for damages to its engine, such negligence on its part would nevertheless in no way effect the right of Mrs. Barnes and John Goldsby to recover from the Gulf & Ship Island Railroad Company.

Under the many decisions of our courts, the decree of the court below should not be disturbed. *Ducton v. Fain,* 109 Tenn. 56; *Turner v. Mobile,* 33 South. 141; *Druon v. Sullivan,* 66 Vt. 609; *Van Auken v. Dammierer,* 27 Ore. 150; *Lehigh Valley Railroad Company v. McFarlan,* 31 N. J. Eq. 730; *Hale v. Allinson,* 188 U. S. 556; *Thompkins v. Craig,* 93 Fed. 885.

Sullivan & Tally, on the same side.

The grounds upon which jurisdiction of equity may be successfully invoked in order to prevent a multiplicity of suits have not existence here. *Nevitt v. Gillespie,* 1 How. (Miss.) 108, 26 Am. Dec. 696.

Where it appears that greater danger is likely to result from granting than from withholding equitable relief or where the

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inconvenience from many actions at law seem to be equally divided as between the plaintiffs and defendant an injunction in favor of the defendant should be refused and the parties left as they are until their legal rights can be determined at law. 1 High on Injunctions, § 13.

The cases cited by learned counsel for appellants have no bearing here. Equity jurisdiction to avoid a multiplicity of suits is not exercised merely to avoid many suits. To secure equity jurisdiction it is necessary that the suits should be governed by the same principles of law and by practicably the same facts. In the case of *Railroad Company v. Garrison,* 81 Miss. 257, 81 South. 257, cited by opposing counsel, the act complained of was a constantly recurring one, and the plaintiffs not only sued because of it once, but some of them sued several times, and all of them threatened to continue to sue. In *Crawford v. Railroad Company,* 83 Miss. 708, 36 South. 82, it appears that fifty-seven persons separately executed notes aggregating a very large amount, the execution of each note growing out of the same transaction and the validity of each depended upon the same identical principle of law. Because the same identical principles of law apply to all the plaintiffs at law, jurisdiction of equity was maintained at the instance of the defendant railroad companies in order to avoid a multiplicity of suits. The case of *Thames v. Mangrum* 87 Miss. 575, 40 South. 327, can have no bearing on this case at bar. There equity had jurisdiction of the cause of action and therefore assumed jurisdiction to settle all disputed matters in one and the same suit, thereby avoiding a multiplicity of suits. The court simply followed the doctrine that when equity takes jurisdiction for one purpose it takes jurisdiction for all purposes. In the *Tisdale case,* 84 Miss. 709, 36 South. 568, the court distinctly said that the jurisdiction of equity was maintainable in the case to prevent a multiplicity of suits as well as because of the inadequacy of the remedy at law. In the *Whitlock case,* 91 Miss. 979, 45 South. 861, all of the many pending separate actions at law against the railroad com-

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pany were by passengers on the same excusion train and the alleged damage claimed by each of them arose by the delay of the excursion train.

The relationship between the two railroad companies, under Laws 1896, § 61, cannot affect the right of the different plaintiffs at law to recover in the circuit court from that one of the two railroad companies which is actually liable for the damages sustained.

Argued orally by *N. C. Hill, R. L. Dent* and *J. N. Flowers,* for appellants, and by *T. H. Campbell,* for appellees.

WHITFIELD, C. J., delivered the opinion of the court.

The case made by this record is as follows: The original bill was filed by the Gulf & Ship Island Railroad Company on the 15th day of June, 1908; the fiat for injunction having been issued by circuit Judge W. H. HARDY on the 13th day of June, 1908, and the bill innvoking the exercise of the equitable jurisdiction of the chancery court in prevention of a multiplicity of suits. To this original bill Virginia M. Barnes and John Goldsby were made respondents. Virginia M. Barnes had sued the Gulf & Ship Island Railroad Company separately at law, and had also brought a suit against the Gulf & Ship Island Railroad Company and the Mobile, Jackson & Kansas City Railroad Company at law, for damages for the death of her husband, the engineer on the Mobile, Jackson & Kansas City Railroad Company engine at the time of the collision. The Gulf & Ship Island Railroad Company pleaded, as one of its defenses to her suit, the contributory negligence of her said husband, Barnes, the engineer. Goldsby sued for damages for personal injury. On the 16th day of June, 1908, the Gulf & Ship Island Railroad Company filed its amended bill against the same two defendants, Virginia M. Barnes and John Goldsby, and also against certain new parties, Mrs. Maggie Gilbert and the Mobile, Jackson & Kansas City Railroad Company, as two ad-

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ditional defendants. The allegation in this amended bill was that Mrs. Gilbert had sued the Gulf & Ship Island Railroad Company for damages growing out of the same collision, and that the Mobile, Jackson & Kansas City Railroad Company was threatening to sue the Gulf & Ship Island Railroad Company for damages to its locomotive and cars injured in the same collision. On the 20th day of October, 1908, the Gulf & Ship Island Railroad Company filed its supplemental bill against Virginia M. Barnes and John Goldsby, defendants to the original bill, and Mrs. Maggie Gilbert, defendant to its amended bill, and also made the Mobile, Jackson & Kansas City Railroad Company a defendant. This supplemental bill alleged, amongst other things, that the Mobile, Jackson & Kansas City Railroad Company was threatening to sue the Gulf & Ship Island Railroad Company for damages amounting to $1,400, growing out of the collision, said damages being due to injury to its locomotives, etc., and further alleged that Virginia M. Barnes had instituted another suit in the circuit court of Forrest county against it, the Gulf & Ship Island Railroad Company, joining with it as a defendant the Mobile, Jackson & Kansas City Railroad Company. The said suit was based on the same cause of action as her original suit. The prayer of this supplemental bill was that Virginia M. Barnes be restrained from prosecuting this last suit against the two railroads, and that all the defendants to the supplemental bill be required to propound their cases to the chancery court, and that all the cases to be consolidated into one case, and tried and determined by the chancery court in one suit, for the purpose of avoiding a multiplicity of suits.

On the 10th day of October, 1908, the Mobile, Jackson & Kansas City Railroad Company presented its cross-bill to Judge W. H. Hardy, praying for and obtaining the issuance of a writ of injunction, requiring all these parties, the Gulf & Ship Island Railroad Company, Virginia M. Barnes, and Maggie Gilbert, to come into the chancery court and have all these claims settled there. This answer and cross-bill of the Mobile, Jack-

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son & Kansas City Railroad Company prayed also that the Gulf & Ship Island Railroad Company be adjudged liable to the Mobile, Jackson & Kansas City Railroad Company for $2,000 damages to its engine and cars, growing out of the same collision; and it was alleged in said answer and cross-bill that, since the filing of original bill by the Gulf & Ship Island Railroad Company, Virginia M. Barnes had sued the Mobile, Jackson & Kansas City Railroad Company, separately and also jointly with the Gulf & Ship Island Railroad Company, for damages growing out of the same collision, and that Maggie Gilbert had instituted suit against the Mobile, Jackson & Kansas City Railroad Company in the circuit court of Greene county, growing out of the same collision. The injunction issued on this answer and cross-bill restrained Virginia M. Barnes from prosecuting her suit against the Mobile, Jackson & Kansas City Railroad Company, and also her suit against the Mobile, Jackson & Kansas City Railroad Company and the Gulf & Ship Island Railroad Company jointly. In December, 1908, the Gulf & Ship Island Railroad Company presented a second supplemental bill against Virginia M. Barnes, John Goldsby, Maggie Gilbert, the Mobile, Jackson & Kansas City Railroad Company, and one L. W. Youmans, to Judge W. H. Hardy, and obtained another injunction against L. W. Youmans, to restrain him from prosecuting a suit he had brought in the circuit court of Jones county against the Gulf & Ship Island Railroad Company and the Mobile, Jackson & Kansas City Railroad Company jointly for injuries sustained by him in the same collision, while a passenger on the Mobile, Jackson & Kansas City Railroad Company's train.

Some comment is made by the learned counsel for the appellee to the effect that Mrs. Gilbert was never made a party, and to the effect that certain of the writs were not served on all the parties against whom they were prayed to be issued, and that none of the defendants appeared at said proceedings, except Virginia M. Barnes and John Goldsby, who presented a demur-

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rer and motions to dissolve, injunctions against them, and the Mobile, Jackson & Kansas City Railroad Company, which filed its answer and cross-bill as hereinbefore stated. To this it is replied by the learned counsel for appellants that none of these points were made in the court below, and that the object of the attorneys for all the parties to these various proceedings is to have this court determine, once for all, whether the equitable jurisdiction to void multiplicity of suits can be invoked on the case thus shown by the record. We shall therefore deal with the case generally, without reference to these minor objections.

The collision in question occurred on July 12, 1907, at an intersection of the Mobile, Jackson & Kansas City Railroad and the Gulf & Ship Island Railroad near the city of Hattiesburg. It will be noted, as a peculiar feature of the litigation, that the two railroads in question in some respects seems to be making common cause against all the plaintiffs suing them, whether separately or jointly. As an example, the attitude of the Mobile, Jackson & Kansas City Railroad Company is that by its cross-bill it not only seeks to recover $2,000 from the Gulf & Ship Island Railroad Company for damages to its locomotive and cars, but at the same time enjoins Mrs. Barnes and Maggie Gilbert from prosecuting their suits against it; and so the Gulf & Ship Island Railroad Company also seeks to enjoin Mrs. Barnes and John Goldsby from prosecuting their suits against it—one for the death of her husband, and one for a personal injury—while at the same time it is contesting with the Mobile, Jackson & Kansas City Railroad Company the question of its liability to that company for alleged damages done to the locomotive and cars of the Mobile, Jackson & Kansas City Railroad Company. In other words, these two railroad companies occupy the attitude of seeking to contest with each other in a court of chancery the question of damages to the locomotive and cars of the Mobile, Jackson & Kansas City Railroad Company, and at the same time both said railroads by means of injunctions are seeking to enjoin all the plaintiffs, in all their suits at law,

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from prosecuting their suits at law. It appears, from the declarations, that Mrs. Barnes sued for the death of her husband, who was the engineer of the Mobile, Jackson & Kansas City Railroad at the time of the collision. John Goldsby sues for damages sustained from an injury to his leg; he being a fireman on the same locomotive of the Mobile, Jackson & Kansas City Railroad Company, operated by Barnes as engineer. Maggie Gilbert and Youmans were both passengers on the same train of the Mobile, Jackson & Kansas City Railroad Company, and were hurt in the collision, and sue for damages. The Mobile, Jackson & Kansas City Railroad Company claims damages for injury to its cars and locomotive, and sues the Gulf & Ship Island Railroad Company for such damages. One of the defenses set up against Mrs. Barnes is the contributory negligence of her husband. Again, section 4896 of the Code of 1906 provides as follows: "Where the main track of two or more railroads shall cross at grade, and the companies owning and operating them shall establish at the crossing an interlocking, derail or other safety device, the commission, if satisfied that it is sufficient to protect persons and property from danger at the crossing, may authorize the railroad companies to run their trains over it without stopping at a rate of speed to be fixed by the commission, and in such event the companies shall not be liable to any penalty for faillng to stop their trains before running them over the crossing." "Where interlocking or other safety device is used, trains need not stop before crossing." Laws 1896, p. 75, c. 61.

The declarations of Mrs. Barnes and John Goldsby charge that these roads did cross at grade, and that the interlocking device had been established, and that at the time of the collision, and for some time prior thereto, it was not in working order, and was spiked down, but that this fact was not known to Engineer Barnes. They further charged that the Mobile, Jackson & Kansas City Railroad Company had obtained the consent of the railroad commission to run over the crossing without stop-

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ping, which fact was known to Engineer Barnes, and that on this account he was accustomed to run over the said crossing without stopping, but that the Gulf & Ship Island Railroad Company did not have such permission. Now, it is perfectly obvious that it was the duty of both these railroads to keep this interlocking device in order, so far as the public were concerned, and that both were negligent as regards the public in not doing so. If the negligence of the Mobile, Jackson & Kansas City Railroad Company in this particular would prevent its recovery from the other railroad for damages to its locomotive and cars, such negligence, nevertheless, would in no way affect the right of Mrs. Barnes and John Goldsby to recover from the Gulf & Ship Island Railroad Company, nor the right of Mrs. Gilbert and Youmans.

Again, if, under section 1985, Code of 1906, the proof should show that the death of Barnes, and the injuries to Mrs. Gilbert, to Goldsby, to Youmans, and to the locomotive and cars of the Mobile, Jackson & Kansas City Railroad Company, were all caused by the running of the locomotive of the Gulf & Ship Island Railroad Company, then manifestly there would arise *prima facie* cases for all these parties against that company; and that company, the Gulf & Ship Island Railroad Company, might overcome this presumption by proof that its locomotive was operated in a lawful manner, and not negligently. Suppose, however, the proof should show that the locomotive of the Gulf & Ship Island Railroad Company was negligently operated, and that this negligent operation was the proximate cause of the death of Barnes, the injury of the other persons, and the damage to the locomtoive and cars of the Mobile, Jackson & Kansas City Railroad Company; then the Gulf & Ship Island Railroad Company would be liable for all the injuries and damages, unless it could show contributory negligence on the part of the servants of the Mobile, Jackson & Kansas City Railroad Company, in charge of that company's locomotive, in which case the Gulf & Ship Island Railroad Company

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would not be liable to Mrs. Barnes for the death of her husband, nor to the Mobile, Jackson & Kansas City Railroad Company for the damage to its locomotive and cars.

Let us take one other view of this curiously conceived bill, and let us present this feature of the case in the language of the very able bief of the learned counsel for appellee. The counsel say:

"The amended and supplemental bills of the Guil & Ship Island Railroad Company and the cross-bill of the Mobile, Jackson & Kansas City Railroad Company allege that the same law and facts apply to all the parties injured in the collision, yet it may be possible under the law and the testimony for both roads to escape liability for the death of the engineer Barnes; but it is utterly impossible for both roads to avoid liability to John Goldsby and the passengers, Mrs. Gilbert and Youmans, for the two locomotives collided on the crossing, thus causing the injuries, and it is inconceivable that the fireman and the passengers could be responsible for the collision, but one or the other of the railroad companies, or perhaps both, are responsible. Therefore the same law and facts do not apply to all the persons suing. If the collision was caused by the negligence of Barnes, then Mrs. Barnes cannot recover from either of the railroad companies; but the very negligence of Barnes would entitle the injured passengers and John Goldsby to recover from the Mobile, Jackson & Kansas City Railroad Company, and would prevent the Mobile, Jackson & Kansas City Railroad Company from recovering against the Gulf & Ship Island Railroad Company for damages to the locomotive and cars, for the reason that the negligence of Barnes is the negligence of the Mobile, Jackson & Kansas City Railroad Company.

"If these cases were being tried separately in the circuit court, as they should be, but for these injunctions, the following would be about the way the cases would be tried:

"(*a*) In the case of *Mrs. Barnes v. Gulf & Ship Island Railroad Company* the plaintiff would prove that Barnes was the en-

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gineer of the Mobile, Jackson & Kansas City Railroad Company; that he was proceeding over the crossing under the belief that the derail switch was in good order, and with the consent of the commission to pass over without stopping, and that he had a clear board; that the engineer of the Gulf & Ship Island Railroad Company was seen by witnesses to approach the crossing at high speed, and that he was signaled to stop, but ignored the signals, and the collision occurred, and Barnes was killed. The defendant would attempt to contradict this testimony, especially as to the manner in which its engineer approached the crossing, and would try to show that Barnes was guilty or contributory negligence. This defense would be met by the contention that the Gulf & Ship Island Railroad Company engine was run over the crossing in a reckless and criminally negligent manner, and that contributory negligence would not avail to avoid liability.

"(*b*) In *John Goldsby v. Gulf & Ship Island Railroad Company* the sole question would be the negligent operation of the switch engine of the Gulf & Ship Island Railroad Company as the proximate cause of the injury. No question of contributory negligence could arise on this trial. No evidence in regard to the derail switch and the duty to keep it in repair would be admissible.

"(*c*) The cases of Mrs. Gilbert and Youmans against the Gulf & Ship Island Railroad Company would be controlled largely by the same law and evidence as the *John Goldsby case*, except evidence of the nature of the injuries sustained. The evidence would have to be established by different witnesses in all the cases."

The trial of the case of *Mobile, Jackson & Kansas City Railroad Company v. Gulf & Ship Island Railroad Company* would not be controlled by the same law and evidence as the other cases, or any one of them, entirely. The question of contributory negligence of the engineer of the Mobile, Jackson & Kansas City Railroad Company might be raised by the Gulf & Ship Island Railroad Company; but the further question which might arise

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between the railroads as to the special duty of one or the other to keep the derail switch in operation or repair and in the event the Gulf & Ship Island Railroad Company should prove that it was the duty of the Mobile, Jackson & Kansas City Railroad Company under a special arrangement to keep the derail switch in repair, and it had neglected to do this, and this was the cause of the injury, the breach of duty of the Mobile, Jackson & Kansas City Railroad Company would prohibit recovery by it; but the other persons injured would not be bound by this arrangement, for as to them it was the duty of both roads to keep the derail switch in repair. Other questions of law and fact can arise between these railroads that the other litigants can have no interest in.

"Looking at this case from the standpoints of the suits against these railroads jointly, we see, for the reasons given above, that the same law and facts will not apply to all the persons injured. In such event the Mobile, Jackson & Kansas City Railroad Company would not be governed and controlled by any law applicable to the plaintiffs suing the roads jointly. If the suits should not be tried against the Gulf & Ship Island Railroad Company individually, nor against the two roads jointly, but should be tried against the Mobile, Jackson & Kansas City Railroad Company individually, then the Gulf & Ship Island Railroad Company is not concerned in the litigation at all, and the law and the facts would not apply alike to all the parties suing; nor would the same law and facts apply in the defense of the Mobile, Jackson & Kansas City Railroad Company, for some of the persons suing were its servants and others were its passengers."

It surely connot be necessary to do more than thus clearly state the case made by this record, to show that equity has no sort of jurisdiction in this case; that the grounds upon which jurisdiction of equity may be successfully invoked in order to present a multiplicity of suits have no existence in this case. The true ground of this equitable jurisdiction was most admirably stated by Chalmers, Justice, in the opinion of this court

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in *Pollard v. Okolona Savings & Trust Co.*, 61 Miss. 293. And this same doctrine has been announced in *Nevitt v. Gillespie*, 1 How. (Miss.) 108, 26 Am. Dec. 696. Yet, strange to say, in the case of *Tribette v. I. C. Railroad Co.*, 70 Miss. 192, 12 South. 32, 19 L. R. A. 660, 35 Am. St. Rep. 642, the directly opposite doctrine was laid down, without the slightest reference being made to either the *Nevitt-Gillespie case* or the *Pollard-Okolona Savings & Trust Co. case*. This court has in many cases recently most carefully re-examined this whole subject, and has re-established the doctrine announced in *Pollard v. Okolona Savings & Trust Co.*, and overruled the case of *Tribette v. I. C. Railroad Co.* These latter cases to which we refer are *Railroad v. Garrison*, 81 Miss. 257, 32 South. 996; *Crawford v. Railroad Co.*, 83 Miss. 708, 36 South. 82, 102 Am. St. Rep. 476; *Tisdale v. Fire Ins. Co.*, 84 Miss. 709, 36 South. 568, and *Whitlock v. Railroad*, 91 Miss. 779, 45 South. 861. All these cases receive the hearty indorsement of the learned counsel for both the appellant and appellee in this cause.

There is a scant suggestion in the brief of the learned counsel for appellant, that the *Whitlock case* is authority for the exercise of this jurisdiction here; but that contention is not seriously pressed, as most manifestly it could not possibly be. That the total dissimilarity of the two cases, so far as the exercise of this jurisdiction in prevention of the multiplicity of suits is concerned, may appear at a glance, it is only necessary, having set out the facts making this case, to now set out, over against them, the facts making the *Whitlock case* in 91 Miss. 779, 45 South. 861. What were those facts? These in brief: That Whitlock and forty-nine other negroes had sued the Yazoo & Mississippi Valley Railroad Company for damages in fifty separate actions at law. Each one of these plaintiffs claimed to have been a passenger on the very same excursion train, and that he was unreasonably delayed on that train by the negligence of the railroad company, and each demanded actual and punitive damages for the delay, and the demand of each was based upon the identical

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facts on which the demand of every other plaintiff was based, and the principles of law applicable to each one of these forty-nine suits were precisely the same. It certainly would be idle to waste further time showing the utter lack of similarity between these two cases. The *Whitlock case* rested, like all the other cases, securely upon the basic proposition that this jurisdiction is exercisable where the principles of law are identically the same and the facts are substantially the same. Indeed, one of the learned counsel for appellees not only correctly says that the *Whitlock case* was properly decided, but that it is perfectly manifest it is not at all analogous to the case under consideration, and further states the correct proposition that the *Whitlock case* is supported in all particulars by the recent cases of *Southern Steel Co. v. Hopkins,* decided by the supreme court of Alabama on the 13th of February, 1908, and reported in 47 South. 274, to which we especially refer. It is too plain for serious discussion that the same principles of law will not apply in all the suits here involved, and just as plain that the same facts will not determine the liability in all the various suits. It would be needless to enter into any further detailed statement to show this. What we have quoted from the very able brief of the learned counsel for appellee has already demonstrated that beyond cavil.

Before passing from this discussion of the true principle on which the equitable jurisdiction to prevent multiplicity of suits in reason rests, we must call especial attention to the masterly opinion of Chief Justice Tyson, of Alabama, in the case of *Southern Steel Co. v. Hopkins et al.,* 47 South. 274, just above referred to. In the judgment of the writer of this opinion, this is the ablest discussion of the subject he has met with in any of the Reports, and we will therefore be pardoned for a liberal quotation from that opinion. That court says, at page 276:

"The question here, then, is: What is the principle upon which equity interferes to avoid a multiplicity of suits? In determining this, it may be borne in mind that the jurisdiction is not to be invoked when the remedy at law is plain, adequate, and

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complete, and that no court has the right to infringe upon the wholesome doctrine of multifariousness which prevents a mingling in one suit of entirely distinct and separate causes of action between different parties. Subject to these restrictions, the principle and rule is that where numerous parties are jointly and severally claiming against one, or where one is claiming against may liable jointly or severally, and the same title or right of defense will be called in question, and will be determinative of the issue for or against all, a case for the interposition of equity to avoid a multiplicity of suits is made, without the aid of any independent equity. The fact that this unity of claim or defense frequently or generally arises from privity or joint action by or between the many affords an obvious instance of the application of the rule, and it has induced some to suppose that the junction and unity of interest calling for the application of the rule is limited to such cases. But the association and unity of interest in the many as to the other party may be brought about just as well by the nature of the transaction, or the situation and relation of the parties, independent of all privity or joint action. And therefore privity, or joint right or liability, although good examples for the application of the principle, afford no test for the propriety of its application.

"The case made by the bill in this case is this: An explosion in a coal mine killed one hundred ten persons. The several administrators of these persons have brought several suits against the appellant as the owner and operator for damages, insisting that its negligence was the proximate cause of the accident. The appellant in effect says, if these actions are allowed to proceed at law, it will be ruined in costs and expenses, though it be successful in every suit; that the plaintiffs are all insolvent, and thus could not pay the taxed costs against them, should they be unsuccessful; that the suits are pending in different courts, and will be called for trial in different courts at the same time; that by reason of this, and the necessity of having the same witnesses in each trial, it is impossible for the defendants to present a proper

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defense to these multitudes of claims. The appellant says, moreover, that it has one and the same and a perfect defense or defenses to all these suits, which will be put forward in each case, and which will be determinative of all alike; and on this ground it is insisted that this is a plain case for the application of the jurisdiction of a court of equity to avoid a multiplicity of suits. We agree with this contention on principle.

"The first thing to obliterate from the mind in considering the question is that it is immaterial how the unity of title, claim, or defense is brought about. It is the factum of a single title against many, or a common defense against many, which is the foundation of the jurisdiction. A vested right of property and a vested cause of defense for protection against liability stand precisely on the same basis; and whence and how such right originated is wholly immaterial. 8 Cyc. 911; *Pritchard v. Norton,* 106 U. S. 125, 132, 1 Sup. Ct. 102, 27 L. Ed. 104. If the unfortunate persons who lost their lives by the explosion had jointly leased the mine, and their administrators had instituted several actions, as in this case, against the owner, it is conceded that the privity between the plaintiffs established by the contract would justify a bill to have the question of liability determined in one suit. But why? Only because a single and common defense would, if successful, determine all the suits. Suppose, however, the owner leased to a third party, instead of the operators, and the same accident happened, and a thousand suits were brought or threatened by solvent, or especially by insolvent, parties; what reason is there for, or could there be for, denying the jurisdiction to enforce in a single suit the common cause of defense against all? Ingenuity, we think, cannot discover a substantial distinction between the two cases, under which the owner in one instance may take shelter in a court of equity against the wrongful and vexatious suits, while in the other he must submit to financial ruin in defending a thousand vexatious actions at law."

The learned Chief Justice Tyson then goes on to show, by ref-

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erence to the case of *Lord Tenham v. Herbert,* 2 Atk. 483, and other English cases, that that doctrine has been "followed and approved in England to the present day." He especially refers to the case of *Sheffield Waterworks v. Yoemans,* L. R. 2 Chan. 8, decided in 1866. Chief Justice Tyson then proceeds further to show that the same view, the correct modern view, was approved in *Hale v. Allinson,* 188 U. S. 77, 23 Sup. Ct. 244, 47 L. Ed. 380, and in *Bitterman v. L. & N. R. R. Co.,* 207 U. S. 205, 28 Sup. Ct. 91, 52 L. Ed. 171, decided in 1907, that great court in those two cases holding "that it did not require a common title, nor community of right or interest in the subject-matter, among the defendants, but only a common interest in the questions of law or fact in controversy." In concluding his opinion, Chief Justice Tyson reviews both the case of *Turner v. Mobile,* 135 Ala. 77, 33 South. 132, and *Tribette v. Railroad Co.,* 70 Miss. 182, 12 South. 32, 19 L. R. A. 660, 35 Am. St. Rep. 642. In speaking of the case of *Turner v. Mobile,* he distinguishes that case from the fourth class of cases mentioned by Mr. Pomeroy; but he frankly says that there are many expressions in the opinion in *Turner v. Mobile* that cannot be approved, but that those expressions are not to be taken as decision, but the *Turner case* is to be looked at, as every case should be looked at, in the light of the exact facts before the court. He thus distinguishes that case, the case of *Turner v. Mobile.* Then, turning to the case of *Tribette v. Railroad Company, supra,* he says as follows:

"The case, however, of *Tribette v. Railroad Co.,* 70 Miss. 182, 12 South. 32, 19 L. R. A. 660, 35 Am. St. Rep. 642, is directly opposed to our views. That case we consider as overruled by the subsequent one in the same court of *Hightower & Crawford v. Railroad Co.,* 83 Miss. 708, 36 South. 83, 102 Am. St. Rep. 476, in which the court expressly approved the view repudiated in the *Tribette case.* It is said in the *Hightower case:* 'We think the doctrine announced by Pomeroy is sound and clearly established by the best-considered modern cases.'

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After this repudiation of the *Tribette case* by the supreme court of Mississippi, we will not follow the reasoning of the opinion in that case to point out its deflection from and opposition, in our opinion, to the ancient, as well as modern, view of the extent of the jurisdiction of courts of equity in reference to multiplicity of suits. That jurisdiction is too well established and too beneficent, when wisely exercised, to be any longer called in question. It would be a strange *casus* in juridical evolution to meet the needs of society if there was no remedy against a party being vexatiously prosecuted at the same time by over seven thousand separate invalid claims held by insolvent plaintiffs, as in the *Sheffield Waterworks case,* L. R. 2 Chan. 8, when each case is founded upon the same facts, and when it is alleged and admitted, by the objection to the jurisdiction, that there is a defense common to all the claims. It is to avoid the monstrosity of such a result that the court of chancery extends its plenary jurisdiction to stay the proceedings at law until the question of liability can be determined in one suit, and therefore we hold that the bill in the case was well filed."

There are one or two other observations due to be made. First, it is said by one of the learned counsel for appellant, that the principal controversy in this case is whether the Mobile, Jackson & Kansas City Railroad Company is liable, or the Gulf & Ship Island Railroad Company is liable. This is an ingenious effort to save the case, but it cannot suffice so to do. The injunctions here were not sued out on the ground that the complainant, the Gulf & Ship Island Railroad Company was likely to be held liable twice for the same injury, because it was sued individually, and also jointly with the Mobile, Jackson & Kansas City Railroad Company. Indeed, there could be but one recovery, and that recovery against one railroad could be pleaded in bar of any other suit for the same injury. Besides, the mere doubt as to which railroad was responsible falls far short of entitling this jurisdiction to be exercised, in view of the manifest differences in other respects, both as to principles of law applica-

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ble, and as to the different facts involved in the different suits by the different parties. Again, it must be remembered that there is a very marked difference between a "multiplicity of suits" and "a multitude of suits." It is not because there are so many suits that this jurisdiction is exercised; but it is only where, there being many suits, they may all be determined by the same principles of law and the proof of practically the same facts. In other words, mere multitude of suits does not confer this jurisdiction, but it is conferred solely by the existence of a condition precedent, no matter how many suits there shall be, that all of them may be determinable by the application of the same principles of law, and by the establishment of practically the same facts. See High on Injunctions, p. 329; *Murphy v. City of Wilmington,* 6 Houst. (Del.) 139, 22 Am. St. Rep. 345. And especially see *Hale v. Allinson,* 188 U. S. 77, 23 Sup. Ct. 252, 47 L. Ed. 380.

We quote from this last case the following: "Manifestly, as it seems to me, the defendants have no common interest in these questions, or in the relief sought by the receiver against each defendant. The receiver's cause of action against each defendant is, no doubt, similar to his cause of action against every other; but this is only part of the matter. The real issue, the actual dispute, can only be known after each defendant has set up his defense, and defenses may vary so widely that no two controversies may be exactly, or even nearly, alike. If, as is sure to happen, differing defenses are put in by different defendants, the bill evidently becomes a single proceeding only in name. In reality it is a congeries of suits, with little relation to each other, except that there is a common plaintiff, who has similar claims against many persons. But as each of these persons became liable, if at all, by reason of a contract entered into by himself alone, with the making of which his codefendants had nothing whatever to do, so he continues to be liable, if at all, because he himself, and not they, has done nothing to discharge the liability. Suppose A. to aver that his signature to the subscrip-

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tion list was a forgery; what connection has that averment with B.'s contention that his subscription was made by an agent who had exceeded his powers, or with C.'s defense that his subscription was obtained by fraudulent representations, or with D.'s defense that he has discharged his full liability by a voluntary payment to the receiver himself, or with E.'s defense that he has paid to a creditor of the corporation a larger sum than is now demanded? These are separate and individual defenses, having nothing in common; and upon each the defendant setting it up is entitled to a trial by jury, although it may be somewhat troublesome and expensive to award him his constitutional right. But, even if the ground of diminished trouble and expense may sometime be sufficient, I should still be much inclined to hesitate before I conceded the superiority of the equitable remedy in the present case. Such a bill as is now before the court is certain to be the beginning of a long and expensive litigation. The hearings are sure to be protracted. Several, perhaps many, counsel will no doubt be concerned, whose convenience must be consulted. The testimony will soon grow to be voluminous. The expense of printing will be large. The cost of witnesses will not in any degree be diminished, and, if some docket costs may be escaped, this is probably the only pecuniary advantage to be enjoyed by this one cumbersome bill over separate actions at law. We are in accord with the views thus expressed, and we therefore must deny the jurisdiction of equity, so far as it is based upon the asserted prevention of a multiplicity of suits." The above we think directly applicable to this case.

Finally, there is one other most important fact to which attention should be called, and that is that the Gulf & Ship Island Railroad Company, in all its bills, never once set up its defenses to any of the several actions. It merely says that it was not liable, without showing by any statement of facts, why it was not liable in any of the cases. Before any injunction should be issued in the exercise of this jurisdiction, the bills should show,

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by a statement of the facts, plainly, that the complainant has a good cause of action, whether by way of claim or defense, either legal or equitable. It need not necessarily be an equitable cause of action. This principle is clearly stated in Pomeroy, Equity Jurisdiction, vol. 1, p. 365: "In the first place, and as a fundamental proposition, it is plain that prevention of a multiplicity of suits is not, considered by itself alone, an independent source or occasion of jurisdiction, in such a sense that it can create a cause of action where none at all otherwise existed. In other words, a court of equity cannot exercise its jurisdiction for the purpose of preventing a multiplicity of suits in cases where the plaintiff invoking such jurisdiction has not any prior existing cause of action, either equitable or legal—has not any prior existing right to some relief, either equitable or legal. The very object of preventing a multiplicity of suits assumes that there are relations between the parties out of which other litigations of some form might arise. But this prior existing cause of action, this existing right to some relief, of the plaintiff, need not be equitable in its nature"—citing *Storrs v. Pensacola & A. R. R. Co.*, 29 Fla. 617, 11 South. 226, 231; *Roland Park Co. v. Hull*, 92 Md. 301, 48 Atl. 366; *Turner v. City of Mobile*, 135 Ala. 73, 33 South. 133, 141; *Purdy v. Manhattan El. R. R. Co.* (Com. Pl.) 13 N. Y. Supp. 295; *Alleghany & K. R. R. Co. v. Weidenfeld*, 5 Misc. Rep. 43, 25 N. Y. Supp. 71, 76.

In the case of *Storrs v. Pensacola & A. R. R. Co.*, 29 Fla. 618, 11 South. 231, that able court said: "A reading of the bill discloses the fact that no community of title or right, or joint interest in the subject-matter of the suit, is alleged in the persons sought to be enjoined; but it does appear that there is a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind of relief asked against each individual person insisting on similar claims against appellee. In view of the fact that the bill fails to allege any sufficient defense, either at law or in equity, on the part of appellee in the suits instituted or threatened, it becomes unne-

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cessary for us to decide whether or not its allegations are sufficient in other respects to justify the interposition of the court of chancery by injunction. The jurisdiction of chancery to prevent a multiplicity of suits cannot be extended to confer upon a party remedial rights where none of any kind existed before. Its exercise necessarily assumes that the complainant in the class of cases before us has some defense, either legal or equitable, to the numerous suits instituted or threatened against him."

There need be no apprehension that this court will ever recede from the doctrine approved by all the best-considered modern authorities, the doctrine as announced in *Pollard v. Okolona Savings & Trust Co.*, 61 Miss. 293, or that we will hesitate to approve the exercises of this equitable jurisdiction to prevent multiplicity of suits, in a case falling within the limitations marked out in that case, and in the later cases recently decided by this court. But, when this court is asked, on facts such as appear in this record, to approve the exercise of this jurisdiction in this sort of case, it is asking what no court of equity could with any possibility be brought to consider for one moment.

Just look, in one closing view, at the incongruities of the situation. Here Mrs. Barnes has brought two actions at law, she being the widow of the deceased engineer, an employee of the Mobile, Jackson & Kansas City Railroad Company—one suit against the Mobile, Jackson & Kansas City Railroad Company, and one against the Mobile, Jackson & Kansas City Railroad Company and the Gulf & Ship Island Railroad Company jointly. Her husband was an employee of the one company, and not of the other. Her rights of action, as regards the two railroads, were distinct in many respects. So Goldsby sues, being an employee of the Mobile, Jackson & Kansas City Railroad Company, not an employee of the Gulf & Ship Island Railroad Company. One of the defenses against Mrs. Barnes is the contributory negligence of her husband. That defense is not pleaded against the other plaintiffs, and in some of these suits manifestly could not be pleaded against some of the plaintiffs.

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Opinion of the court.

Mrs. Gilbert sues in the capacity of passenger on the Mobile, Jackson & Kansas City Railroad, and, it is to be specially noted, sues on an entirely distinct ground from any of the other suits, to wit, that the collision occurred from the negligence of the tower employee in not giving the proper signals to the engineers on the two engines on the two railroad trains. Here is a wholly different cause of action presented by Mrs. Gilbert from any in the entire list of cases. Again, the Mobile, Jackson & Kansas City Railroad Company sues the other railroad company for damages to its locomotive and cars, raising a question in which these two railroads are concerned, but with respect to which the other parties have no concern whatever.

And, lastly, the questions which arise in respect to section 4896, Code of 1906, under the facts in this record, are wholly different, according to the parties whose rights are being considered. In short, there is no possible view of the particular case made by the precise facts in this record under which the exercise of this equitable jurisdiction is entitled to be invoked. And let it always be kept religiously in mind that what a court always decides is the exact case made by the precise facts in the particular record examined.

From these views it follows that the decree of the court below was correct, and it is *affirmed*.

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Brief for appellant.

ALBERT COHN v. THOMAS H. SMITH ET AL.

[49 South. 611.]

ADVERSE POSSESSION. *Scrambling.*

A mere scrambling possession of land, however long continued, is insufficient to confer title by adverse possession.

FROM the chancery court of Lawrence county.

HON. G. GARLAND LYELL, Chancellor.

Smith and others, appellees, were complainants in the court below; Cohn, appellant, was defendant there. The complainants claimed to own the land in controversy, predicating their claim of actual adverse possession for more than thirty years of the premises by their ancestors, from whom they inherited. The only deed under which complainants claimed was a tax deed executed in pursuance of a tax sale which was not only confessedly void but from which the lands were redeemed within the time allowed for redemptions. The defendant's paper title was perfectly deraigned from the United States government.

The averments of the bill touching the occupation and adverse possession of the land were denied by the answer.

The case was heard on the pleadings, the deeds made exhibits thereto and oral testimony heard by consent. It is deemed unnecessary to state even the substance of the testimony in view of the opinion of the court.

From a decree in complainants' favor defendant appealed to the supreme court.

A. A. Cohn, P. Z. Jones and *McWillie & Thompson,* for appellant.

There is nothing in the testimony in this case fixing definitely the date of anything claimed by appellees to evidence an adverse possession; some things are said to have been done in the lifetime of T. H. Smith, Sr., but he died in 1901, only six years

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Brief for appellant.

before the beginning of the suit and, therefore, nothing is proved to have been done or to have happened, save the annual payment of taxes, more than ten years before the beginning of this suit. Nothing is shown to have been continuous; whatever was done was merely sporadic; the element of continuity is wholly wanting in everything save perhaps in the matter of paying taxes. The payment of taxes may characterize a possession otherwise proved, but does not tend to prove it.

McCaughn v. Young, 85 Miss. 277, 37 South. 839, does not warrant the decree appealed from. That case is explained in *Kennedy v. Sanders,* 90 Miss. 524, 43 South. 913. We invite special attention to the case last mentioned. The payment of taxes on land, as just stated, does not evidence or tend to prove possession of the land; such payments may be offered in evidence as tending to prove a claim of title, not as tending to prove possession? No length of claim without possession will ripen into title. *Magee v. Magee,* 37 Miss. 138. This is the idea of our statutes, Code 1880, § 2668; Code 1906, § 3094, all rocked on adverse possession. The testimony in this case may tend to prove a claim of title by appellees, but it is wholly insufficient to prove an adverse possession by them or those under whom they claim. The pretended possession is altogether too insubstantial.

We cannot conclude this brief more appropriately than by quoting the closing sentence of the opinion of this court in the case of *Kennedy v. Sanders,* 90 Miss. 524, 43 South. 913, wherein Chief Justice WHITFIELD said: "Solemn paper title, perfect from the government down, is of great, definite, fixed value and cannot be brushed aside by attempting to set up tax titles, absolutely void, for want of power to sell, and seeking to make them good by pleading statutes of limitations having no application and constructing an airy fabric of title so insubstantial that

"Like the Borealis' race
It flits ere you can point the place."

We earnestly ask a reversal of the decree appealed from and

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Brief for appellees.

the rendition of a final decree by this court in appellant's favor denying all relief, dismissing complainant's bill and adjudging them to pay the costs of this court and of the court below.

G. Wood Magee, for appellees.

The land in controversy here has been assessed to appellees and those under whom they claim since 1872, and they have uniformly paid the taxes on same since that time. This fact is not only shown by the record in the case but it is admitted by counsel for appellant.

It is shown that Mrs. A. I. Smith who died in the year 1880, was the mother of appellees, T. H. Smith, Jr., and Victor Smith, and the wife of T. H. Smith, Sr., who died in the year 1901, and that appellees inherited the land involved in this suit from A. I. Smith.

Appellees show an unbroken chain of tax receipts for thirty-seven years; having paid the taxes on the land every year since 1872.

The land is not susceptible of actual occupancy and cultivation. It is shown that the father of two of the appellees claimed the land in his lifetime, and that he had it posted to keep off trespassers; used the timber on it, such as he needed for fencing and firewood. In other words, he exercised such acts of possession and control of the land as he exercused over any other lands claimed and owned by him.

He not only paid the taxes on the land but gave mortgages or deeds of trust on it just as he would any other property owned by him.

The appellees do not contend that the tax sale made on May the 10th, 1875, was valid. In other words, they admit, that according to repeated holdings of this court, that the sale was invalid. *Kennedy v. Sanders,* 90 Miss. 535, 43 South. 913, and cases there cited.

But these appellees say that the deed which Smith received from the state gave color of title to the lands in controversy.

To acquire title by adverse possession does not require actual occupancy or actual standing upon or living upon the land.

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Opinion of the court.

Actual possession of land consists in exercising acts of dominion over it and in making the ordinary use of it, and in taking the profits of which it is susceptible. This dominion may consist in and be shown by a great number and almost endless combinations of acts, and where the statutes of limitations have not designated certain things as requisites, the law has prescribed no particular manner in which possession shall be maintained and made manifest. Nor on the other hand, has the law attempted to lay down precise rules by which the sufficiency of a given set of facts to constitute adverse possession may be determined.

It is ordinarily sufficient if the acts of ownership are of such nature as the party would exercise over his own property and would not exercise over another's. Actuality of possession is a question compounded of law and facts and its solution must necessarily depend upon the situation of the parties the nature of the claimant's title, the character of the land and the purpose to which it is adapted and for which it has been used." 1 Cyc. 983, 986.

The true rule, so far we are told, is also announced by Judge HARRIS delivering the opinion of the court in the case of *Ford v. Wilson,* 35 Miss. 505, where he says: "That neither actual occupancy, cultivation or residence is necessary to constitute actual possession when the property is so situated as not to admit of any permanent useful improvements and the continued claim of the property has been evidenced by public acts of ownership, such as he would exercise over property which he claims in his own right and would not exercise over property which he did not claim."

Argued orally by *R. H. Thompson,* for appellant.

SMITH, J., delivered the opinion of the court.

The evidence in the court below discloses a perfect record title in appellant to the land in controversy; but the chancellor held that appellees were the owners thereof by adverse possession.

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Syllabus.

There was evidence of claim of ownership on the part of appellees, but no evidence amounting to proof of possession. At most it showed nothing more than a mere "scrambling possession," which is not sufficient to cause title to vest by adverse possession.

The decree of the court below is therefore reversed, and the bill dismissed.

LEXINGTON LODGE v. LULA G. BEAL.

[49 South. 833.]

1. PARTY WALLS. *Deeds. User.*

Where a deed to a strip of land off of the south side of the grantor's lot reserved a right in the grantor to use the wall which the grantee contemplated building on the north side of the strip, and required openings to be left in the wall, so that the grantor could have access through the grantee's building to the upper floors of any house that he might erect on the balance of his lot, a common wall constructed and used accordingly for many years became and was a party wall.

2. SAME. *Destruction. Reconstruction.*

Where a party wall, after the destruction of one of the connected buildings, was found to be too weak to support a new and taller building which the owner of the destroyed one wished to erect, he may tear down the old wall and replace it with a new one, although the owner of the other building would be inconvenienced thereby and the old wall is sufficient for his purposes, but the rights of the parties in the new wall will be the same as in the old one.

3. SAME. *Same. Negligence.*

The right of a co-owner to tear down and rebuild an insufficient or dangerous party wall must be so exercised as not to inflict avoidable injury on the owner of the adjoining building and such owner may recover for the negligent exercise of the right.

4. SAME. *Decree sustaining right. Harmless error.*

A decree in equity sustaining the right of an adjoining owner to tear down and reconstruct a defective or insufficient party wall should, without prescribing specifications, provide that the work be done with proper care to avoid needless injury to the adjoin-

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Brief for appellants.

ing owner, and, ordinarily, require an indemnifying bond to protect defendant against avoidable damage resulting from the work; but a decree will not be reversed on appeal because it prescribes specifications for the work where they are admittedly proper ones, nor because of a failure to require an indemnifying bond from a solvent complainant, no demand having been made therefor by the defendant in the trial court.

FROM the chancery court of Holmes county.

HON. JAMES F. MCCOOL, Chancellor.

The Lexington Lodge, No. 24, of Free and Accepted Masons and Lexington Royal Arch Chapter, No. 9, appellants and cross-appellees, were complainants in the court below; and Mrs. L. G. Beall, and another, appellees and cross-appellant, were defendants there. From a decree partly in favor of, but unsatisfactory to, complainants they appealed to the supreme court, and the defendants prosecuted a cross-appeal.

The opinion of the court states the facts.

Tackett & Elmore, for appellants and cross-appellees.

It was erroneously contended by the appellees and cross-appellants in the court below that the wall in controversy was a party wall; and that as a rule the appellants and cross-appellees had no right to interfere in any way that would deprive appellees and cross-appellants of the use of the wall, notwithstanding the effects of the fire. We contend that the fire effected such a radical change in the surroundings that all easement rights which appellees and cross-appellants previously enjoyed in the wall were ended. This is true, without regard to the safe or unsafe condition of the wall at present. *Hoffman v. Kuhn,* 57 Miss. 750; *Partridge v. Gilbert,* 15 N. Y. 601; *Sherrard v. Cisco,* 4 Sandf. 480.

To hold that, so long as the wall stands the owner whose house has been destroyed is compelled to lose the use of his lot or to replace the destroyed building with another of exactly the same pattern, is to impose in perpetuity a servitude which was assumed only for a specific purpose. *Hieatt v. Morris,* 78 Am. Dec. 280.

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Brief for appellees.

The bill charged that the walls, and especially the north wall, are dangerous and unsafe; and the court below properly found that this allegation had been sustained by the proof. When a party wall becomes dangerous and unsafe, or unfit for the use for which it was erected, either of the owners may, by giving reasonable notice to the other, proceed to tear down so much of the wall as is situated on his own land, and if he uses reasonable care and skill under the circumstances, he is responsible for no damage accruing to the other party; nor shoud he be required to see that the roofs and floors of the other's building be properly supported, nor should he be required to take affirmative measures to protect the stock of merchandise of the other party at his own expense. *Partridge v. Gilbert, supra; Crawshaw v. Sumner,* 56 Mo. 577; *Maypole v. Forsyth,* 44 Ill. App. 494.

Boothe & Pepper, for appellees and cross-appellants.

The evidence shows that the wall as it now stands is reasonably safe as a support for appellees' two-story building. But the wall is not capable of supporting a new three-story building which the appellants contemplate erecting.

If a party wall, on the destruction of the building, is rendered insufficient for the use contemplated by the owner of the destroyed building, it is no objection to his rights to tear down and reconstruct the wall that the adjoining owner will be put to inconvenience and that the existing wall is insufficient for his purposes. *Weems v. Mayfield,* 75 Miss. 286, 32 South. 892; Code 1906, § 3565; *Putzell v. Bank,* 78 Md. 349; *Keiffer v. Dickson,* 41 Ind. App. 543; *Montgomery v. Masonic Hall,* 70 Ga. 38; *Lederer v. Colonial Investment Co.,* 130 Iowa, 157; *Hunt v. Ambruster,* 17 N. J. Eq. 208. It is not necessary that a party wall should stand half-way upon each of the adjoining parcels of land; it may stand half-way upon each or wholly upon one and may or may not be the common property of the two land owners. 30 Cyc. 774.

A decree which sustains the right of the adjoining owner to tear down and reconstruct a party wall should go no further

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than to require that the work be done with proper skill and care to avoid injury to the adjoining owner, and the decree should not prescribe the specifications for the work.

Argued orally by *W. P. Tackett,* for appellant, and *A. M. Pepper,* for appellee.

ALEXANDER,* Special Judge, delivered the opinion of the court.

In 1846 the Lexington Masonic lodge purchased the south half of lots 60 and 61 in the town of Lexington. The north half of said lots was then owned by one Samuel Hoskins. About the year 1858 the lodge erected a three-story brick building, which covered the land so purchased by it and also a strip of land six feet wide off the south side of the north half of the Hoskins lots. It does not appear how the lodge originally acquired this strip, but the deed records disclose a conveyance executed in 1866 by the administrator of Samuel Hoskins, which purports to have been executed under an order of the probate court and recites that Samuel Hoskins in his lifetime had sold to the Lexington lodge and chapter this strip of land upon the condition that Hoskins should have and enjoy the right or privilege of connecting with the then contemplated Masonic Hall, both in the front and rear of said lot, and that the lodge should, in erecting its building, leave openings in the north wall for doors to afford entrance into the upper story of the building contemplated to be erected by Hoskins, and that Hoskins should enjoy the right of entrance to said rooms forever.

At the time the Masonic Hall was erected or shortly thereafter, Hoskins also built a two-story brick storehouse on his lot. It is not shown, otherwise than from the recitals in the administrator's deed aforesaid, what agreement, if any, there was as

* Judge Smith having been of counsel in this case before his appointment to the bench recused himself and C. H. Alexander, Esq., a member of the supreme court bar, was selected and presided in his place.

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to the division wall between the two buildings; but the evidence leaves no doubt that the mutual intention was that the wall should be used as a party wall. There is some controversy as to whether this wall was built wholly on this strip of land, or whether some part of it or its footings projected on the Hoskins lot. However this may be, it is certain that the foundation extended beneath the cellar of the Hoskins building, and the wall was constructed in such a manner as to serve as a support for both buildings. Joists for both buildings were let into the wall, the openings therefor extending entirely through the wall, and the joists connecting, so that when the Masonic Hall was burned the ends of some of the joists of the adjoining building were burned. Moreover, there were two or three doors in the walls at the second floor, and the entrance to the second floor of the Hoskins building was through the stairway of the Masonic building and these doors. This condition of things continued until 1892, when the heirs of Samuel Hoskins conveyed the entire north half of lots 60 and 61 to Baxter Wilson. This description, it will be noted, made no exception of the aforesaid strip of land. Wilson made some changes in his building, among other things, closing up and filling in the doorways in the wall, and discontinued the use of the stairway of the Masonic Hall, and thereafter, until the building was destroyed by fire, a period of more than ten years, the wall remained solid and was used only as a party wall. It further appears that Wilson made no claim to the strip of land, but recognized in various ways the ownership thereof in the Masons. In 1906 he conveyed his lot to appellee, Mrs. Beall, describing it as the "north half of lots 60 and 61 according to the official map of the city, the same being that store building and lot now occupied by the said Baxter Wilson and used in conducting a hardware business in said city." Before this, in 1902, the Lexington lodge and chapter built in the rear of their building a one-story brick annex, extending for this purpose the division wall to the height of one story. Later, in 1906, Mrs. Beall, also wishing to enlarge her

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hardware store, sought and obtained from the lodge a contract by which, for a consideration of $100 she was given the right to erect at her own expense another story on the one-story wall of the annex to the lodge building. This contract stipulated that it should not be construed as conveying any interest in the land on which the annex wall was situated. She thereupon extended her two-story brick building the entire length of the annex.

On December 29, 1907, the three-story brick building owned by the Masonic lodge and chapter was accidentally destroyed by fire. Neither the annex nor the adjoining building of Mrs. Beall was burned, and the north wall of the Masonic Hall, which was the south wall of appellee's building, was left standing to the height of two stories and still serves as a support for appellee's building; but some of the sleepers and joists which were let into the party wall were so badly charred as to necessitate the bracing up of the floors of the building. The Masonic bodies, desiring again to build a three-story brick building to cover their entire lot, sought the opinion of architects as to the strength and safety of the wall, and, being advised that on account of its original faulty construction and its weakened condition as the result of the fire it would not, if built upon, sustain the weight of their new building, entered into negotiations with appellee to obtain her consent for the tearing down and rebuilding of the wall. These negotiations culminated in a written proposition from the lodge, offering at its own expense to demolish and rebuild, and containing detailed specifications as to the manner in which the work should be done and the precautions proposed to be taken in the progress of the work. This offer was refused in writing by appellee, and her refusal was accompanied by a formal notice that she objected to any attempt to remove or repair the south wall of her building.

Thereupon the Masonic lodge and chapter filed this bill, seeking to enjoin Mrs. Beall and others from interferring with them

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in tearing down the wall for its entire length and rebuilding the same, and also praying that she be required at her own cost and expense to protect her building during the progress of the work. Much testimony was taken as to the present condition of the wall, both that of the Masonic Hall proper and that of the annex, and also as to the probable danger which would result to the building and merchandise of appellee. The court decreed in favor of complainant, that they were the owners of the strip of land in question and that they were entitled to tear down and rebuild the wall for its entire length at their own expense, but embodied in the decree the requirement that the work should be done in accordance with certain specifications, which were the same as those contained in the written proposition of settlement which had been made by complainants and refused by defendant. The decree also taxed complainants with half the costs. From this decree complainants appeal, and defendants prosecute a cross-appeal.

We concur with the chancellor in his finding that appellants, complainants in the court below, are the owners of the strip of land described as six feet off the south side of the north half of lots 60 and 61 in the town of Lexington. But this ownership has throughout been burdened with an easement or servitude in favor of the owners of the adjoining lot, who have an undoubted right to have the wall in question treated as a party wall. We deem it immaterial to inquire whether the wall rests wholly on the said strip of land, or whether, as appellees contend, some part of it, or at least some part of its footings, project on her lot—a question that might be very material if the wall had been totally destroyed, and it was purposed by either party to rebuild it without the other's consent. The front portion of the wall, as stated, is still standing to the height of two stories, and the rear portion, which divides appellee's building from the annex, and which is comparatively new, was not appreciably injured by the fire; but there is evidence showing that, on account of inferior material and faulty construction, it is insufficient for the

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contemplated new building. The evidence fairly establishes that the wall as it now stands and for its entire length is reasonably safe as the support for the two-story building of appellee, especially since it has been reinforced and strengthened by her since the fire; but it is, we think, equally apparent from the testimony that the wall is not capable of supporting the new three-story building which appellants contemplate erecting, and, if built upon, would be unsafe and dangerous.

It is immaterial whether the mutual rights of the parties in this wall be referred to the condition in the deed executed in 1866 by the administrators of Samuel Hoskins or based on possession and user since its construction. If appellants take under the deed, they will be held to an acceptance of the reservation in it of the right to connect with their building. If, on the other hand, the rights of the parties rest on possession and user, it is certain that the use of the wall, as well as of the land covered by it, has been for a period of fifty years joint and mutual. Whether the deed be valid or not, it illustrates the nature and extent of the easement asserted and actually enjoyed by Hoskins and those holding under him, including appellee. However the rights of the parties in the wall were originally acquired, it must now be viewed and treated as a party wall.

Where one of the buildings supported by a party wall has been destroyed, and the wall itself has been so weakened as to be dangerous or insufficient as a support for the building which the owner of the destroyed building is about to erect, he has the right to tear down the insufficient or dangerous party wall and replace it with one stronger and better, provided he gives to the adjoining house the same right of support as it had in the old one. He is but exercising his legitimate rights of property. If it follows from this that the owner of the adjoining building will be put to inconvenience while the work of demolition and construction is going on, this is an unavoidable consequence attendant upon the adoption and use of party walls. It cannot be the law that the fortunate adjoining owner, whose building

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is not destroyed, and who may be content with the wall, although weakened or partially destroyed, can, by refusing to the co-owner whose building has been destroyed permission to tear down and rebuild the wall, compel him either not to build again or to build only such a structure as the wall remaining may suffice to support. *Putzell v. Drovers & Mechanics' National Bank,* 78 Md. 349, 28 Atl. 276, 22 L. R. A. 632, 44 Am. St. Rep. 298.

While the adjoining owner, whose building has been destroyed and who wishes to tear down an insufficient or dangerous wall, and rebuild, will be accorded this right, it must be exercised so as to work no avoidable injury to the owner of the adjoining building He will be liable if the work is done negligently and damage to the co-owner results therefrom. The decree of the court below recognized this principle; but we do not think it was within the province of the court to go further and prescribe in detail the specifications according to which the work of tearing down and rebuilding should be conducted, or the precautions which should be taken. The decree should have gone no further than to provide that complainants may, in the exercise of proper skill and due care to avoid injury to appellee, proceed with the work of tearing down and rebuilding the party wall, leaving the question as to what would constitute negligence to be controlled by the general principles governing that branch of the law. However, since the specifications for the manner in which the work should be done, as set out in the decree, are those contained in the written offer of settlement made by the lodge, and since counsel for appellee concede that the specifications are unobjectionable, and only complain that a bond indemnifying against damage was not exacted, we will not disturb the decree because of this feature. While the court doubtless had the power to have required the lodge to give a bond of indemnity to protect against damage resulting from the work, it was not reversible error to omit such requirement, especially as no spe-

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cific demand was made for it in the pleadings, and it sufficiently appears that the lodge is solvent and responsible.

We are not prepared to say that the court erred, under all the circumstances, in taxing the costs equally against the parties.

The decree is affirmed on appeal and cross-appeal, and the costs of this court likewise taxed equally against the appellants and cross-appellants. *Affirmed.*

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94 530
194 542

JEFFERSON DAVIS COUNTY v. SIMRALL LUMBER COMPANY.

[49 South. 611.]

1. SCHOOL LANDS. *Sixteenth sections. Title in state.*

The title to the sixteenth-sections school lands is in the state, in trust for the support of the public schools of the township in which the same are respectively situate.

2. SAME. *Waste. Actions for. Counties.* Code 1906, §§ 4695–4716.

Code 1906, §§ 4695–4716, conferring on the counties control of the sixteenth sections of school lands, confers on them all powers necessary to carry out the purposes of the statute, and a county may sue for waste committed in cutting timber on such lands within its borders.

3. SAME. *Delegatus non potest delegare.*

Counties are mere political subdivisions of the state, created to act for the state in local matters, and the rule forbidding the delegation of a delegated power does not prevent the state from acting through them in dealing with sixteenth-sections school lands.

4. SAME. *Leases. Rights of lessee. Waste.*

A lessee of sixteenth-section school lands may in good faith clear up for cultivation such portions of it as a prudent owner in fee would clear for that purpose, but he must leave enough timber for the necessary permanent use and enjoyment of the reversion.

5. SAME. *Good faith. Cutting timber.*

The good faith of a lessee of sixteenth-section school land in clearing up portions of it for cultivation is to be determined, if ques-

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Brief for appellant.

tioned, by a jury, and the jury must determine to what extent he may cut timber from the facts existing at the time.

6. SAME. *Same. Commercial purposes.*

The cutting of timber for commercial purposes from a sixteenth-section school land leasehold is waste, notwithstanding a claim that it was cut for agricultural purposes.

FROM the circuit court of Jefferson county.

HON. ROBERT L. BULLARD, Judge.

Jefferson Davis county, appellant, was plaintiff in the court below; the lumber company, appellee, was defendant there. From a judgment in defendant's favor the plaintiff appealed to the supreme court.

The facts are stated in the opinion of the court

Livingstone & Milling and *J. O. Cowart,* for appellant.

The testimony of appellee showed that they bought, cut, manufactured into timber and sold the timber solely for commercial purposes, while the testimony of Tyrone, the real vendor, shows that he intended and still intends to denude the lands of all of the timber.

It is manifest from the evidence that the timber was bought and sold for commercial purposes and without any thought on the part of the buyers or sellers of putting the lands into immediate cultivation.

It was held in the case of *Warren County v. Gans,* 80 Miss. 81, 31 South. 539, that when the tenant cuts timber in the process of clearing the land for immediate cultivation, he can appropriate it or its profits to his own benefit, but could not cut the timber for sale without making himself amenable for waste. When the timber is cut by the tenant or others unnecessarily or unlawfully, the right of the reversioner or remainderman at once attaches, and he may bring an action on the case in the nature of waste for damages. Whether the tenant cut timber unnecessarily upon a claim of doing so for reasonable estovers or for the cultivation of the land and whether sufficient wood and

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timber were left for the permanent use of the inheritance are questions for the decision of the jury.

The fact that the appellees purchased the timber in controversy by warranty deed without limitation as to time in which to remove it made them tenants for years of the same and it was waste for them to cut the timber under any circumstances for commercial purposes.

For a history and complete exposition of the principles of law underlying this case we cite the following authorities; *Learned v. Ogden,* 80 Miss. 769, 32 South. 278; *Moss Point Lumber Co. v. Harrison County,* 89 Miss. 448, 42 South. 290; *Warren County v. Gans,* 80 Miss. 76, 31 South. 539.

Hathorn & Hearst, for appellee.

The declaration does not show nor does the evidence show that the county ordered or authorized the institution of this suit.

There is nothing in the record to show that the county had a right to bring this suit, that is, that it was the proper party to maintain this action, even though the defendants were guilty of waste; because there is nothing to show that the county had any interest or property rights in the remainder of the property in controversy.

The right to sue for damages in the nature of waste, which is the action here, in a court of law is enforcible only by the party holding the vested legal title to the reversion or the remainder of the estate for years.

In support of this doctrine we cite Tiedman on Real Property, 2d ed. sec. 81, 2; Kent's Commentaries, 9th ed. vol. 4, pp. 83-4; Enc. P. & P. vol. 22, p. 1096; Am. & Eng. Ency. Law. vol. 30, pp. 275-6, Adams Equity, p. 208; Am. Dig. vol. 48, p. 2127; Am. Dec. vol. 72, p. 721. And we especially call the the attention of the court to the case of *Warren County v. Gans,* 80 Miss. 76, 31 South. 539, as authority on this point and quote from the opinion in that case the following significant language: "When the timber is cut by the tenant or others unnecessarily

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Brief for appellee.

or unlawfully, the right of the reversioner or remainderman at once attaches, and he may bring his action on the case in the nature of waste for his damages," etc. We also direct the attention of the court to the case of *Moss Point Lumber Company v. Harrison County,* 89 Miss. 448, 42 South. 290, especially to the learned opinion of Mr. Justice MAYES rendered therein, in which he quoted the opinion of the court in the *Gans case, supra,* literally and adopted it as a part of his opinion.

By the cession from the state of Georgia to the United States, April 24, 1802, the United States took title to a large area of land now comprising a part of the state of Mississippi, and in which territory the sixteenth section involved in this suit is located, and this sixteenth section was reserved as school lands for the use and benefit of the inhabitants of the township in which it is located. Hutchinson's Code, p. 55.

The supreme court of Mississippi in the case of *Jones v. Madison County,* held that the United States, by the Georgia cession, took title to the sixteenth section lands as trustee, and that the state of Mississippi, upon its creation as a state, took the legal title to these sixteenth sections as trustees for the use and benefit of the inhabitants of the townships, each respectively, in which the sixteenth section is situated. *Jones v. Madison County,* 72 Miss. 777, 18 South. 87.

It follows then as surely as the night follows the day that the title to the reversion of the lands involved in this suit has always been and now is in the state of Mississippi as a trustee. The state is, therefore, the only party that has authority, as a matter of law to maintain this action.

But it may be contended by appellant that it is authorized by the state to maintain this action. In answer to this we say, first, that the state held this title as trustee and was bound by all the limitations that an individual would be bound by, and that the state of Mississippi, as trustee, could not delegate its authority to another. That is to say, the state, by reason of its sovereignty, took no greater rights or authority by a conveyance of

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property in trust than an individual trustee would have taken. Of course an individual trustee cannot delegate his power under a trust and we need cite no authority on this point. We do not think it necessary to argue this proposition at greater length; but we desire to call the attention of the court to the opinion of Chief Justice WHITFIELD, in the *Moss Point Lumber Company case,* cited *supra,* in which he took occasion to discuss at length and with great force the trust view of this subject.

The state of Mississippi, in keeping with its sacred trust, has never undertaken to authorize Jefferson Davis county to maintain this suit, and to substantiate this we invite the attention of the court to all the statutes and decisions applicable, so far as we know, in this case, and which we fear may have misled appellant in instituting this suit.

Code of 1906, was in force when this action was instituted. Section 4701 of the Code of 1906 provides in part as follows: "The several counties wherein are situated any of such lands (meaning sixteenth sections) have, through their respective boards of supervisors, under the general supervision of the land commissioner, jurisdiction and control thereof," etc. The only authority conveyed to the supervisors in this section is conveyed in the words "Jurisdiction and Control." These words do not carry with them the right to sue and under them the board of supervisors took no right to prosecute this suit. The word "Jurisdiction" confers the right to determine disputes and matters of controversy; the word itself means literally an announcement of the law and carries with it the idea of a judicial body. It pertains only to those bodies and officers who have authority to sit in judgment and to try causes. It in no sense carries with it the right to litigate. The word control carries with it only the authority to direct and manage and supervise, as an illustration the school teacher has a right to control the school, the conductor has a right to control his train; but no one would contend that either of these could bring a suit with reference to the property over which he has no control.

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Opinion of the court.

The court was correct in giving the peremptory instruction for the appellees not only for reasons above given but as well because the evidence was not sufficient to establish the amount of timber cut by appellees nor its value, and because the uncontradicted evidence offered on behalf of the defendants shows that whatever timber was cut by the defendants was cut under such circumstances that it did not constitute waste.

SMITH, J., delivered the opinion of the court.

"Jefferson Davis County, plaintiff, by its board of supervisors," instituted suit in the court below to recover from appellee damages for waste alleged to have been committed by appellee in cutting timber from sixteenth section land. Judgment was rendered in favor or the defendant, and plaintiff appeals to this court.

The right of the county, or its board of supervisors, to institute a suit of this character, is challenged on the ground that an action for waste can only be brought by the owner of the fee, the party having the right to the reversion; that such title and reversion of sixteenth section land is in the state; that the state has never authorized counties, or the boards of supervisors thereof, to institute such suits; and, if it has, to do so was beyond the power of the state. The title to sixteenth section land is in the state; but it holds same in trust for the support of the public schools of the township wherein the same is situated. Chapter 129 of the Code of 1906, and particularly section 4701 thereof, confers upon the several counties, through their respective boards of supervisors, under the general supervision of the land commissioner, jurisdiction and control of sixteenth section land, to be exercised, of course, within the terms of the original trust, and imposes upon them the duty of collecting all funds arising from such lands. This grant of jurisdiction and control, coupled with the duty to collect funds, necessarily carries with it all powers necessary to carry out the purpose of the grant, one of which necessarily is the power to institute suit for collection

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of such funds. To do this was clearly within the power of the state. This, in fact, was not a delegation of power within the rule of *"delegatus non potest delegare."* A county is a political subdivision of the state, created for the purpose of acting for the state in local matters, whose powers are exercised by a board of supervisors. The state, in thus dealing with sixteenth section land, acts through one of its own, and most appropriate, governmental agencies. For such purposes, and within the power conferred upon it, the county is the state.

Coming, now, to the case on its merits, the facts are that on the 16th day of January, A. D. 1906, appellee purchased from the lessee of the land in question the timber thereon by means of the following contract: "In consideration of $1.00 in hand paid and the further sum of $16.50 per acre, to be paid as hereinafter mentioned, I hereby grant, bargain, sell, convey, and warrant unto James-Sumrall Lumber Company all of the timber being, lying, standing, and being on the following described land: E. ½ of N. E. ¼ and S. E. ¼ section 16, T. 7, R. 19 west, Lawrence (now in Jefferson Davis) county, Mississippi. It is here understood that said timber shall be paid for in the following manner: On commencing on the said timber after this date, the said James-Sumrall Lumber Company agrees to pay for eighty acres at the said rate of $16.00 per acre; then thereafter, until all of said timber has been cut, the said James-Sumrall Lumber Company agrees to keep forty acres paid for in advance of the forty they may then be cutting on, together with the right at all times from the date thereof of ingress and egress upon said lands to cut down and remove said timber therefrom; and also I grant to said company, their successors and assigns, for the consideration aforesaid, a right of way over, through, and across said property, or any part thereof, to construct, maintain, and use logging railways, or tram roads, or dirt roads, with the right to construct, maintain, and use spur tracks or roads over through, and across said land continuously for the purpose of removing the timber now owned

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or to be acquired by said company from said and all lands adjacent to the above-described land."

Appellee, after the execution of this contract, commenced to cut and remove the timber from said land, so that on November 27, 1907, the date of the filing of this suit, practically all of the merchantable timber had been removed from about two hundred acres thereof. This timber was cut by appellee on its part for purely commercial purposes, and the reason that it did not remove same from the remainder of the land was that it "did not know what would be the outcome of it." The lessee, or her husband, who acted for her, claimed that he made this contract with appellee for the purpose of having the land cleared for cultivation, and that it was his intention "to clean up" the remainder thereof; that about eighty acres of it were put in cultivation in 1907, and at the time of the trial about two hundred and fifteen acres of it had been put in cultivation; and that a part of the lumber manufactured by appellee from the timber obtained from this land had been purchased by him to use in building fences and houses thereon. At the close of the evidence the court instructed the jury to find for the defendant, and there was a verdict and judgment accordingly.

In *Warren County v. Gans,* 80 Miss. 76, 31 South. 539, and *Lumber Co. v. Harrison County,* 89 Miss. 526, 42 South. 290, 873, it is held that a tenant of sixteenth section lands "may clear up for cultivation such portions of it as a prudent owner in fee would clear for that purpose, provided he leaves enough timber and wood as may be necessary for the permanent use and enjoyment of the inheritance." He must do this, however, in good faith. Such good faith is a question for the jury, which being established, it is for the jury also to say to what extent he may cut timber before he is guilty of waste, in both instances under the direction of the court as in other cases. Whether or not an act on the part of the tenant constitutes waste is determined by the facts and conditions which exist at the time the act is committed, and wherever the evidence in a particular case

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Statement of the case.

shall show the fact to be that timber was cut and sold from a sixteenth section leasehold really and actually for commercial purposes, no subsequent subterfuge or pretense, under cover of which it shall be claimed that it was cut and sold for agricultural purposes, will be tolerated by the courts.

The giving of the peremptory instruction, therefore, was error.

Reversed and remanded.

JEFFERSON DAVIS COUNTY v. BASS S. LONG ET AL.

[49 South. 613.]

1. SIXTEENTH SECTIONS. *School lands. Waste by lessee.*

A lessee of sixteenth-section school land has no right to substantially injure the reversion by destroying the timber thereon, nor by making a non-destructive use thereof.

2. EVIDENCE. *Judicial notice. Turpentining pine trees. Effect.*

The court does not judicially know whether or not extracting turpentine from pine trees causes a substantial damage as the necessary or usual result.

3. SCHOOL LANDS. *Waste. Suit for. Declaration. Demurrer.*

A declaration, in an action by a county against a lessee of a sixteenth-section school land, alleging that the lessee was committing waste, and making solely a commercial use of the pine timber thereon by extracting crude turpentine is not demurrable.

FROM the circuit court of Lawrence county.

HON. ROBERT L. BULLARD, Judge.

Jefferson Davis County, appellant, was plaintiff in the court below; Long and others, appellees, were defendants there. From a judgment sustaining defendants' demurrer to the declaration and dismissing the suit, plaintiff appealed to the supreme court. The facts are stated in the opinion of the court.

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Brief for appellant.

W. H. Livingston and *J. O. Cowart,* for appellant.

This court has held that the title of sixteenth section lands is in the state of Mississippi in trust, and it has also held that the county may institute replevin for the recovery of timber wrongfully cut from sixteenth section school lands. *Warren County v. Gans,* 83 Miss. 76; 31 South. 539; *Chamberlain v. Lawrence County,* 71 Miss. 949, 15 South. 40. Accordingly, if replevin was applicable in such instance, we can see no reason why a county cannot sue a lessee of sixteenth section school lands for timber destroyed by him theeron, where substantial injury results to the inheritance. *Lumber Company v. Harrison County,* 89 Miss. 448, 42 South. 290.

It will be noted that the declaration alleged that the appellees boxed for turpentine purposes all the pine timber standing on the sixteenth section lands, and that they had extracted, given away, and converted into spirits of turpentine and sold for commercial purposes, several hundred barrels of crude turpentine taken from such standing timber. The court below held that it was not waste to box timber and extract therefrom turpentine for sale for commercial purposes. This was error. Waste at common law is defined to be a spoiling or destroying of fixtures, gardens, trees or other corporeal hereditaments "to the disherison of him that hath the remainder or reversion in fee simple or fee-tail." Timber is certainly a part of the inheritance, and to cut down standing timber or do any act whereby the standing timber may decay, is waste. Chitty's Blackstone. vol. 1, § 284; 28 Am. & Eng. Ency. Law (1st ed.), 868; 50 Am. & Eng. Ency. of Law (2d ed.), 240.

It has been held a question for the jury as to whether the tapping of maple trees for the purpose of making sugar constitutes waste; that is, as to whether the tapping tends to shorten the life of and in the end destroy the trees. *Campbell v. Shield,* U. C. Q. D., 459. See also *Moss Point Lumber Company v. Harrison County, supra.*

The statute laws of Mississippi provide that if a person shall

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box for turpentine or shall cut, or cause to be cut, or boxed, any pine tree on land not his own, without consent of the owner of the land or tree, he shall pay to the owner thereof a certain amount as compensation. Code 1906, § 4983. Under the circumstances, it was error in the court below to say that the extracting of turpentine from the trees was not a substantial damage to the trees.

G. Wood Magee, for appellees.

The title to the sixteen section lands of Mississippi is in the State of Mississippi in trust for the inhabitants of the respective townships in which the different sixteenth sections are situated. In other words the state holds title in trust for the benefit of the people. *Jones v. Madison County,* 72 Miss. 777, 18 South. 87. A plaintiff, in an action at law must have the legal capacity to sue. The county, plaintiff, in this case, can have only such rights to maintain this suit as may be conferred upon it by the statute law. Were it not for Code 1906, § 309, empowering a county to sue and be sued by its name, no suit at all could be brought by or against any county in this state. The only authority tending to confer upon a county the right to sue in a case such as this might arise either under Code 1906, § 4695 or Code 1906, § 4701. Code 1906, § 4695, confers upon the board of supervisors of a county the right to take such action as is necessary to ascertain the true conditions of the title of the sixteenth section lands in the county. No authority whatever is conferred thereunder in favor of the county to maintain a suit such as this now before the court. Code 1906, § 4701, confers upon the board of supervisors of every county, under the general supervision of the State Land Commissioner jurisdiction to control all sixteenth section lands in the county and all funds arising from any disposition thereof. Nowhere does this code section confer upon the board of supervisors of a county any authority to maintain a suit for waste.

The cases of *Warren County v. Gans,* 80 Miss. 76, 31 South.

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539, and *Chamberlain v. Lawrence County*, 71 Miss. 448, 15 South. 40, cited by appellant, do not uphold the theory that a county has a right to maintain in the circuit court a suit for waste.

The state is the reversionary owner of all sixteenth section lands within its boundary and, as reversioner, can alone sue for waste in the circuit court. *Howard v. Patrick*, 58 Mich. 795; *Gillett v. Treganza*, 13 Wis. 472; *Wilson v. Galey*, 103 Ind. 275.

The appellees being the owners of an estate in the land for a term of years, had the right during the term to take from the pine trees on the land turpentine, as charged in the declaration. Such action does not diminish nor impair the value of the trees for timber or saw mill purposes, nor does it impair or diminish the value of the trees to box them for turpentine and resin. *Orrell v. Bay Manufacturing Company*, 83 Miss. 800, 36 South. 561.

MAYES, J., delivered the opinion of the court.

This suit was instituted by Jefferson Davis county, on the order of the board of supervisors of the county, against Long and another, engaged in operating a turpentine still in Jefferson Davis county. The gist of the declaration is to the effect that on the 24th day of January, 1850, the proper authorities designated by law so to do, leased to one Lemuel Bullock for a period of ninety-nine years a certain tract of land therein described, being the sixteenth section school lands; that Lemuel Bullock made divers conveyances of the land in question to various persons, who in turn conveyed to others, a part of which lands were finally purchased by Long and Ewing. The declaration then proceeds to state:

"That under and pursuant to said conveyance or conveyances or assignments to defendants herein, they (defendants) did, on or about the 17th day of September, 1904, and at various and sundry times since that date, enter upon said land, and did then

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and there box all the pine timber for turpentine purposes, and that, too, in utter disregard of their right so to do, and to the injury of the revisionary interest of plaintiff and the general public in and to said land and timber. That defendants have boxed and caused to be boxed for turpentine purposes all the pine timber standing or being on said above-described land, and have extracted, carried away, and sold for commercial purposes a large quantity of crude turpentine, to wit, one thousand, one hundred barrels of crude turpentine, and of the value of $4,400. That defendants did not box and turpentine said timber for the purpose of clearing said land for cultivation; but, on the contrary, they boxed said timber, and extracted the crude turpentine therefrom, and manufactured the same into spirits of turpentine and resin, and sold the same solely for speculative and commercial purposes, all of which acts and doings were and are acts of waste and injurious to the freehold, and to the damage of plaintiff in a great sum, to wit, $4,400. Wherefore plaintiff, by its said board of supervisors, brings this suit and demands judgment of the defendants for its said damages, to wit, $4,400, together with all costs in this behalf legally expended."

To this declaration a demurrer was interposed, substantially setting up, first, that the county has no authority to maintain the suit; and, second, that the extracting of turpetine and resin from the trees did not, as a matter of law, constitute waste, when done by one owning a leasehold in sixteenth section school land. The demurrer was sustained, declaration dismissed, and from this judgment an appeal is prosecuted.

The question as to the county's right to maintain a suit for waste committed on sixteenth section school land was practically decided in the case of *Lumber Co. v. Harrison County,* 89 Miss. 448, 42 South. 290, 873; but all doubt as to this was removed by the decision of this court in the case of *Jefferson Davis County v. James-Sumrall Lumber Co., ante,* 530, 49 South. 611. The question of the rights of lessees of sixteenth section school lands has been so recently under review by this court, and so fully dis-

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cussed in the case of *Lumber Co. v. Harrison County,* 89 Miss. 448, 42 South. 290, 873, that we will not here repeat the discussion. Under the authority just cited, it was held that lessees of these lands cannot destroy the timber to the substantial injury of the inheritance, or make any other use of the timber not resulting in its destruction which substantially injured the estate of the reversioners. Where the declaration alleges that a lessee is committing waste, and its further allegations show that he is making a commercial use of the timber solely, surely no such declaration should fall before a demurrer which admits its allegations.

We cannot judicially know the effect of extracting turpentine from trees—that is to say, whether or not a substantial damage is the necessary or usual result; but we have held that any purely commercial use of the timber standing on the character of lands in question, resulting in damage, is unlawful. We have held in the *Lumber Company Case supra,* that in so far as this state is concerned "the usual purpose for which lands are leased are agricultural purposes, and, unless the contrary be stipulated in the lease, the lease carries with it only such rights as go with ordinary leases;" and, this being the law in this state, it is manifest that the appellees are making an unusual and unlawful use of the land in question—the only question being whether the injury complained of is of that substantial character as to constitute waste.

Reversed and remanded.

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Brief for appellant.

JOEL F. JOHNSON v. EUGENE E. SUTTON.

[49 South. 970.]

1. BROKERS. *Commissions. When not earned.*

Where the contract between the broker and his principal specifies the terms on which land is to be sold, the broker performs his duty and is entitled to his commissions when he produces a purchaser ready, willing, and able to buy on the specified terms; but where the terms are not specified, and the actual sale is to be made by the principal, the duty is not performed until he produces a purchaser to whom the principal sells.

2. SAME. *Case.*

Where a broker, employed to procure a purchaser of timber land, up to fifty thousand acres, for a specified commission, payable out of the purchase money, secured a purchaser willing to purchase forty thousand acres on condition that the portion of the tract which had not been inspected should be of a certain quality, and the purchaser refused to take the land, on the ground that a part of it was not of the standard called for, and the owner and the purchaser canceled the contract of sale, the broker was not entitled to commissions.

FROM the chancery court of, first district, Hinds county.

HON. G. GARLAND LYELL, Chancellor.

Sutton, appellee, was complainant and cross-defendant in the court below; and Johnson, appellant, was defendant and cross-complainant there. From a decree in favor of Sutton, Johnson appealed to the supreme court.

The opinion of the court states the facts.

W. R. Harper, for appellant.

The agreement between Sutton and Johnson was clearly unilateral and hence not binding upon either until performance by the other.

Under the terms of the contract between Johnson and Sutton

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it was necessary for a sale to be made of those particular lands described in the contract, to wit: "certain timber lands lying along Pearl river in the counties of Rankin, Madison, Hinds, Scott and Leake and in the state of Mississippi." Manifestly the contract referred to those lands which Sutton and Johnson had together ridden over and examined. Moreover, the contract stipulates that such amount as Sutton should be entitled to under the contract was "to be paid out of the purchase money as soon as any land is sold to such purchaser." This contract of Johnson with Sutton provided for a sale, not for an agreement of sale; and Sutton's part of the money was to be paid to him by Johnson out of the fruits of the completed transaction. Johnson did not contract with Sutton that the lands should be of any particular character or quality; but he simply agreed that the lands thus to be sold in the counties mentioned, should be sold to Sutton's customer.

Did Sutton bring a customer who bought the lands and paid for them? Did he bring a customer who absolutely agreed to buy them? Certainly not. He instead found a purchaser who agreed to purchase such lands only on condition that they came up to a certain standard. It is true that Johnson guaranteed that the lands would come up to such standard but this guaranty was made not to Sutton but to Foley & Lawson in order to get them to advance the $250,000 and execute their written agreement with him to purchase. The guaranty upon Johnson's part was given gratuitously in so far as Sutton was concerned. It was true that Johnson, when he guaranteed these lands, thought that they would come up to the standard, but in this he was only guessing. He was not an expert in timber matters.

This is not a case where Sutton found and produced a customer willing and able to buy the lands in question, and to whom Johnson arbitrarily refused to sell. On the contrary Johnson was eager and anxious to sell these lands to Foley & Larson. Under the circumstances Johnson cannot be held liable to

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Brief for appellant.

Sutton. *Bull v. Price,* 20 English Common Law, 115; *Olsen v. Jodon,* 38 Minn. 467, 38 N. W. 485; *Hinds v. Henry,* 36 N. J. Law, 332; *Owen v. Ramsey,* 23 Ind. App. 288, 55 N. E. 247; *Tombs v. Alexander,* 101 Mass. 256, 3 Am. Rep. 349; *Dorrington v. Powell,* 52 Neb. 443, 72 N. W. 587.

The reason that Sutton is entitled to nothing under his contract, is that no sale was ever made "to any purchaser brought by him, either directly or indirectly." *McPhail v. Buell,* 87 Cal. 116, 25 Pac. 266; *Cremer v. Miller,* 56 Minn. 53, 57 N. W. 318. We concede that the weight of authority is to the effect that, where there is no special contract, a real estate broker is entitled to his commission when he has produced a purchaser ready, willing and able to make a purchase. But even in such case there is a considerable and respectable line of authority that a consummated sale is necessary before the broker is entitled to his commission, or it must be shown that the seller arbitrarily refuses to make the sale. All the courts, however, unite in holding that where a special contract is shown with the broker it must be looked to entirely to determine whether it was the intent of the parties that a complete and consummated sale should be a condition precedent to the right of the broker to his commissions. *Tombs v. Alexander,* 101 Mass. 256; *Holbrook v. Investment Co.,* 30 Or. 265, 47 Pac. 920; *Condict v. Cowdrey,* 139 N. Y. 280, 34 N. E. 781; *Olsen v. Jodon,* 38 Minn. 467; *Hinds v. Henry,* 36 N. J. 332; *Dorrington v. Powell,* 52 Neb. 443.

J. B. Harris, on the same side.

The language of the contract between Johnson and Sutton shows clearly that the parties contemplated an actual sale of land before the appellee would be entitled to any compensation. The sum of fifty cents per acre was to be paid "for each and every acre which shall be sold to any purchaser brought by second party;" and was "to be paid out of the purchase money," and "as soon as any land is sold to such purchaser."

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Brief for appellant.

Now, we are not insisting that a case might not arise under the terms of this contract between appellant and appellee in which appellee would be entitled to the fifty cents per acre, although no sale should be made. For instance, if the appellee had produced a party ready and willing to buy, and the appellant being able to perform his part of the contract, should capriciously fail to convey the land or consummate the sale, it might be that the appellee could recover fifty cents per acre for the number of acres which the appellant was able to convey and which the purchaser was able and willing to take, but which the appellant refused to convey. But we have no such case here. This was not the ordinary contract of a real estate broker to produce a purchaser, but the scheme was a joint operation between Sutton and Johnson, by which they were endeavoring to make what may be called a "timber deal." Johnson, on his part, was to get the land, and Sutton to get parties who might buy. Johnson was not the *owner of the land,* nor is it shown that he was offering, for himself, to sell any specific quantity of land.

The correspondence between Sutton and Johnson, which was offered in evidence, shows that Sutton was not acting as an ordinary real estate broker, but was acting conjointly with Johnson, who was himself a *quasi*-broker, in an endeavor to sell lands to Foley & Larson, Sutton himself being fully aware of the whole situation, and had personally inspected the lands. Appellant and appellee were to co-operate in the endeavor to get control of forty thousand acres of land for the purpose of selling the same to Foley & Larson. If the sale should go through, appellant and appellee were to share in the proceeds, Sutton's share to be fifty cents per acre for such lands as were sold, to be paid out of the purchase money.

Sutton did not produce a purchaser ready and able to buy the lands which Johnson acquired and tendered. The prospective purchasers, Foley & Larson, declined to take the lands on the ground that they did not come up to the standard and their

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final refusal to take the lands left Johnson for a time in a very precarious condition financially. The court will note that the lands were finally sold to a third party, Herrick, with whose procurement Sutton had nothing whatever to do.

The principles of law applicable to real estate brokers are fully discussed in the elaborate notes to the cases of *Hoadley v. Savings Bank,* 44 L. R. A. 322 and *Lunney v. Healey,* 44 L. R. A. 593. See also *Dorrington v. Powell,* 52 Neb. 440, 44 L. R. A. 611; *Fultz v. Wimer,* 34 Kan. 576; *Hinds v. Henry,* 36 N. J. L. 328.

Powell & Powell, on the same side.

There are two questions in this case. First. Did Sutton's contract with Johnson only require him to introduce Johnson to a law suit, or did it require him to furnish a buyer who would actually buy? Second. Was there ever a completed sale between Johnson and Foley & Larson for these lands?

Johnson desired to sell his lands for cash only. In fact he could not sell in any other way as he was compelled to get money from Foley & Larson to buy a good part of the lands. Sutton himself understood that the lands were to be actually sold and the money paid, because he agreed in his contract with Johnson that he should be paid out of the proceeds of the sale. It is evident that Sutton and Johnson both understood that Sutton should bring, not a prospective purchaser for the lands who would buy on certain contingencies, but a purchaser who would unconditionally buy the lands.

The sale of property is not complete between seller and buyer, so as to pass title, while anything remains to be done between them in relation to the property, whether it be identification of the property or fixing the price. *Williams v. Sayers,* 79 Miss. 50, 29 South. 995; Story on Sales (3rd ed.), § 296. The price must be fixed without the necessity of further negotiations between the parties. 21 Am. & Eng. Ency. of Law (1st. ed.), 466.

Where any act remains to be done by the vendor in order to

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ascertain value, quantity or quality the sale is not complete. *Baldwin v. McKay,* 41 Miss. 358. It was the agreement between the prospective purchasers and Johnson that before there should be a sale the amount of timber on the lands should be estimated and determined by comparison with a certain tract of well-known timbered land belonging to the wife of appellant, and if all of the lands should prove satisfactory, by such comparison the sale would be made. Right here the parties disagreed and never got together; their minds never met and hence no sale was ever made.

Sutton was to make a sale and not merely leave Johnson in the midst of a law suit with Foley & Larson. And accordingly the $10,000 which Johnson paid to Sutton, one-half of the commission claimed, should be returned by Sutton. 1 Mecham on Sales, § 499, Story on Sales, §§ 231-232.

Alexander & Alexander, for appellee.

The contract between appellant and appellee was not unilateral. Both appellant and appellee agreed to certain obligations. Sutton was to use his best efforts to secure a purchaser for the lands before offering such purchaser any other lands. Furthermore the contract was signed by both parties; and, inasmuch as its performance was actually entered upon, it is too late now to contend that it was unilateral.

It was only Johnson's failure, and not his inability, to produce the requisite timber lands after agreeing so to do with Sutton and then with the purchaser produced by Sutton, which resulted in Foley & Larson's not finally closing matters with Johnson. While Johnson procured several thousands of acres of land in the counties mentioned in the contract, he did not exhaust his efforts; and if he had used enough diligence, he could within ninety days' time have acquired sufficient good timber lands to meet the contract required, out of the rich virgin country within the enumerated counties. He has failed to show that it was beyond his ability to acquire the requisite acreage of good timber land. That he may have gotten together forty

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thousand acres of land is not sufficient; it was necessary for him to get together forty thousand acres of good timber lands, and his failure as to this resulted from his own neglect. It is not contended by learned counsel for appellant that Foley & Larson even up to August, 1905, were at any time unwilling or unable to purchase and pay for the forty thousand acres of good timber lands if Johnson had only gotten and tendered the lands to them.

That appellant and appellee could legally contract in regard to lands in the counties mentioned, that is, within a definite limit, which lands were yet to be purchased by Johnson, will, we think, hardly be questioned. *Rutland v. Brister,* 53 Miss. 686; *Dotson v. Milliken,* 209 U. S. 237, 53 L. Ed. 768.

The contention that the appellee, Sutton, will be entitled to no recovery from appellant until proof shown that Johnson had actually received the purchase money, is without reason. It would preclude justice from being done, if, after a broker has done all that he can do, and a failure of sale occurs solely through the caprice or negligence or delay or fault of his principal, the principal should be allowed to say that inasmuch as he had not received the purchase money the broker could have no claim whatever upon him for compensation. *Hugill v. Weekley,* 15 L. R. A. (N. S.) 1262; *Kock v. Emmerling,* 22 How. (U. S.) 72; *Timberman v. Craddock,* 70 Mo. 638; *Dolan v. Scanlan,* 57 Cal. 266; *Fox v. Rouse,* 47 Mich. 558; Cent. Digest, vol. 8, p. 1210; *Lumney v. Healey,* 44 L. R. A. 493; *Hoadley v. Bank,* 44 L. R. A. 321; *Delta, etc., Co. v. Wallace,* 83 Miss. 665.

Even if the contract between appellant and appellee referred to certain lands already acquired by appellant at the time the contract between appellant and appellee was made, appellant should still be held liable to appellee, for the reason that there is no proof that the lands in question were deficient in quality. The evidence distinctly shows that appellant, in a former suit in chancery instituted by him against Foley & Larson which is made exhibit to this pending cause, distinctly swore that the

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Brief for appellee.

land did comply with Johnson's written contract with Foley & Larson. Furthermore Foley and Larson would never have paid over to Johnson a quarter of a million dollars, as they did, if the land had not been of proper quality. The decision by the chancellor on the facts was in favor of appellee and this court should so construe it. There was no necessity for Johnson to repay Foley & Larson the $250,000 on Foley & Larson's complaint that the lands which he delivered to them were not up to the guaranteed standard. If any of the lands were not up to the standard it was merely requisite upon Johnson to go out into the rich virgin territory along Pearl river and buy, in the counties enumerated, sufficient lands of the requisite quality to complete the amount of acreage necessary. It was not Sutton's fault if the lands were not up to quality, and accordingly the court below properly decreed in favor of appellee. *Roberts v. Kimmons,* 65 Miss. 332; *Cheatham v. Yarbrough,* 90 Tenn. 77.

The duty of a real estate broker is discharged when he has found a party who will be acceptable to the owner and who enters into a contract of purchase with the owner. 4 Am. & Eng. Ency. of Law (2d ed.), 976; *Delta, etc., Co. v. Wallace,* 83 Miss. 665.

Appellee's contract with Johnson entitled him to a commission for every acre which should be sold to any purchaser brought by appellee, "either directly or otherwise." Although appellant allowed Foley & Larson to rescind the sale to them, it is shown that Johnson subsequently sold the same lands to one Herrick. If it had not been for appellee and for the prospective purchasers produced by him, and the payment to appellant of the $250,000 which appellant used in acquiring the lands which he subsequently sold, appellant would not have been in position to have made a subsequent sale to Herrick. In the unreported cases of *Weathersby v. Watts* and *Weathersby v. Rhodes,* decided by CALHOUN, J., at the recent term of this court, this court affirmed a recovery of commissions by a real

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estate agent where the sale was made to a purchaser introduced to the owner by a person to whom the broker had shown the land, and in such decision the court approved instructions announcing that if the broker started the "chain of circumstances" that culminated in a sale, he should recover.

Chalmers Alexander, on the same side.

When a broker brings the parties together and the price and terms are agreed upon between them, and the contract is signed, he does all that he is compelled to do to entitle him to recover his commissions as the procuring cause of the sale.

The weight of authority supports the rule that if the broker is employed to find or procure a purchaser, and he secures one who is able, ready, and willing to purchase upon the terms named by the principal, and who is accepted by the principal, he has, in the absence of an express agreement to the contrary, performed his contract, even though the terms and conditions of sale as given by the principal to the broker are modified or varied by the principal in his negotiations with such purchaser —especially when the negotiations continue without interruption.

The following authorities fully support the above rules upon the ground that the broker is in such a case the moving cause of the sale as he has brought the parties together and thereby procured a purchaser and performed his contract which was contingent upon his success. *Schlegal v. Allerton,* 65 Conn. 260; *Knowles v. Harvey,* 10 Colo. App. 9; *Bryant v. Abert,* 3 App. D. C. 180, 186; *Dooman v. Ives,* 73 Ga. 295, 301; *McConaughty v. Mahannah,* 28 Ill. App. 169; *Lawrence v. Atwood,* 1 Ill. App. 217, 223; *Rees v. Spruance,* 55 Ill. 308, 310; *Mears v. Stone,* 44 Ill. App. 444, 447; *Clark v. Messler,* 50 Ill. App. 652; *Hafner v. Herron,* 165 Ill. App. 242, affirming 60 Ill. App. 592.

If the broker produces a *bona-fide* purchaser,—that is, a purchaser who is able, ready, and willing to purchase and to per-

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Opinion of the court.

form the contract upon his principal's terms, or upon modified terms accepted by the principal,—he is entitled to his commissions without reference to the consummation of the sale, unless the failure to consummate it, where the title is good, is chargeable to such purchaser and not to the fault, refusal, or defective title of the principal. *Smith v. Schiele,* 93 Cal. 144; *Middleton v. Findley,* 25 Cal. 81; *Block v. Shannon,* 29 Cal. 395; *Phelan v. Gardner,* 43 Cal. 311; *Neilson v. Lee,* 60 Cal. 565; *Phelps v. Prusch,* 83 Cal. 628; *Vinton v. Baldwin,* 88 Ind. 104, 45 Am. Rep. 447; *Blodgett v. Sioux City & St. P. R. Co.,* 63 Iowa, 606; *Ford v. Easley,* 88 Iowa, 603; *Brown v. Wilson,* 98 Iowa, 316.

If the broker produces a man of means and abundantly able pecuniarily to carry out the contract, and who evidences his readiness and willingness to do so by executing the same, and paying the earnest money, the fact that the contract is never carried out for reasons arising between the parties to it, for which the broker is not responsible, cannot, so far as the merits of the law of the case are concerned, bar his right to commissions. *Yoder v. Randell,* 3 L. R. A. (N. S.), 576; *Dotson v. Milliken,* 27 App. D. C. 500.

Argued orally by *J. B. Harris* and *W. R. Harper,* for appellant, and by *Chalmers Alexander* and *C. H. Alexander,* for appellee.

SMITH, J., delivered the opinion of the court.

On March 15, 1905, appellant and appellee entered into the following contract: "Madison, Miss., March 15, 1905. This agreement, made and entered into this day, by and between Joel F. Johnson, of Madison, Miss., as first party, and E. E. Sutton, of St. Paul, Minn., as second party: The said parties herein named having in contemplation the sale of certain timbered lands lying along the Pearl river, owned by first party and others, being in the counties of Rankin, Hinds, Scott, Madison, and Leake, and the state of Mississippi, it is agreed between the

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parties hereto that first party shall pay to second party or his authorized agent fifty cents per acre for each and every acre which shall be sold to any purchaser brought by second party, either directly or otherwise, up to fifty thousand acres, said amount to be paid out of the purchase money as soon as any land is sold to such purchaser. It is further agreed that said lands up to fifty thousand acres shall be secured by first party and shall be handled by and through him and delivered to said purchaser. It is further agreed that in any other deals hereafter, which first party may secure, that he will co-operate with second party in the sale of the same, giving second party first right or chance to secure buyer for any such tract of land so secured, before offering it to others; and the second party here agrees to use his best efforts to secure a purchaser for said lands so secured by first party before offering said purchaser any other lands. Witness our hands to two (2) copies of this agreement.

"JOEL F. JOHNSON, First Party.
"E. E. SUTTON, Second Party."

Pursuant to this contract, appellee induced Timothy Foley and Peter Larson, composing the firm of Foley & Larson, to enter into negotiations with appellant with a view of purchasing timber lands, which resulted in the execution of a contract by which Foley & Larson agreed to purchase from appellant forty thousand acres of timber land at an agreed price per acre, which contract, among other things, provided: "That in consideration of one hundred thousand dollars to him in hand paid by the parties of the second part as earnest money, the party of the first part agrees to deliver to the parties of the second part, by proper deed with covenant of warranty, forty thousand acres of timber lands, at ten dollars and fifty cents per acre, except six hundred and forty-four acres known as the 'Yeagley tract,' in Rankin county, Mississippi, of which the purchase price will be seventeen dollars and fifty cents per acre and thirteen hundred and twenty-six acres, being the Powell and Foote tract of land, for which tract the purchase price will be fifteen dollars per acre.

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Opinion of the court.

It is agreed that the timber lands to be sold, conveyed, and delivered are the same lands looked over and inspected by Thomas Foley, Eugene E. Sutton, and Joel F. Johnson, and such other lands as he may own or acquire along the Pearl river, that shall average for timber to a standard equal to the five thousand one hundred and twenty-three acres owned by Joel F. Johnson and wife, adjoining the homestead, but situated in Rankin county. All of said lands that have not been examined and approved shall be subject to the examination and approval of the parties of the second part or their agents."

Appellant thereupon proceeded to acquire timber land sufficient in quantity to aggregate, when added to the amount already owned by him, forty thousand acres, and tendered same to Foley & Larson, who declined to accept it on the ground that it, or part of it, was not land of the standard required by the contract. After vainly endeavoring to induce Foley & Larson to accept and pay for the land, appellant instituted suit against them in the chancery court, praying for a specific performance of the contract. Prior to the rejection of the land by Foley & Larson, they had advanced appellant $250,000 under this contract, and appellant had paid appellee the sum of $10,000, one-half of the commission to which he was entitled on the sale of forty thousand acres of land. While the suit for specific performance was pending, appellant, having then an opportunity of disposing of the land to another party and owing debts contracted in the purchase of the land which were then due, entered into an agreement with Foley & Larson by which each released the other from any liability growing out of their said contract; appellant refunding to Foley & Larson the $250,000 advanced him and paying them in addition thereto the sum of $50,000 to cover the expense claimed by Foley & Larson to have been incurred by them in consequence of said contract. The suit for specific performance was then dismissed, and the land sold to another party, with whom appellee had no connection.

Appellee then demanded of appellant the payment of the sum

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of $11,288, balance claimed by him as commission on the sale of forty-two thousand five hundred seventy-seven acres of land, which he claimed appellee could and ought to have made to Foley & Larson. Payment was refused, and this suit was instituted in the court below by appellee to recover said amount. Whereupon appellant filed an answer, denying that appellee was entitled to the relief prayed for, and made his answer a cross-bill, praying that appellee be decreed to refund the $10,000 he advanced him. From a decree dismissing the bill, and directing appellant to pay appellee $9,911.50 and interest thereon, this appeal is taken.

The contention of appellee is that when he brought Foley & Larson and appellant together, and the contract between them was executed, he had done all that he was required to do under his contract, and was, therefore, entitled to his commissions. Where the contract between the broker and his principal specifies the terms upon which the land is to be sold, the broker has performed his duty and is entitled to his commissions when he produces a purchaser ready and willing and able to buy upon the terms specified; but where the terms are not specified, and the actual sale is to be made by the principal, as in the case at bar, his duty is not performed until he produces a purchaser to whom the principal sells. Under appellee's contract it was his duty to produce a purchaser who would buy timbered land, the actual sale to be made by the appellee. He did produce a purchaser who was ready, willing and able to purchase forty thousand acres of timbered land, but on condition that that portion of it which had not been inspected should be of a certain quality. Appellant was under no obligation to furnish land of this quality, and his agreeing with Foley & Larson to do so imposed on him no obligation to do so, so far as appellee was concerned.

It follows, therefore, that the contract with Foley & Larson was not a contract for the sale of land such as was contemplated by the contract between appellant and appellee, and as the sale was never, in fact, consummated, appellee never became entitled

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to his commissions. Appellee cannot complain because appellant did not comply with his agreement with Foley & Larson to furnish lands of a certain quality, or, if he did so comply, because he did not hold Foley & Larson to their contract; for without this agreement the contract with Foley & Larson would never have been made, and as he (appellant) was under no obligation to appellee to make this agreement, he was under no obligation to him to comply with it, or to hold Foley & Larson to a compliance with their contract, even if he could have done so, as to which we express no opinion. All the authorities bearing on every phase of this question will be found set out in the briefs of counsel on both sides, to which reference is here made.

The decree of the court below is reversed, the bill dismissed, and decree here on cross-bill directing appellee to refund to appellant the $10,000 paid him under the contract of March 15th.

Reversed, etc.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY v. LEONA FARR ET AL.

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[48 South. 520.]

1. RAILROADS. *Master and servant. Death of servant. Suit for. Negligence. Pleadings and proofs. Variance.*

In an action against a railroad company for the wrongful death of a locomotive engineer, a variance between the declaration, charging that the collision resulting in the death was caused by the negligence of defendant's telegraph operator in failing to properly deliver a train order dispatch to the conductor of a train, and evidence, showing that the operator placed the message, with two others, on a table in front of the conductor when he called for orders, instead of delivering it to him and having him read it aloud as required by the rules of the company, and permitted the conductor to depart leaving the order on the table, is not sufficient to defeat a recovery by the plaintiffs.

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Statement of the case.

2. SAME. *Same. Contributory negligence. Proximate cause.*

The acts of a locomotive engineer in remaining in his seat on the right side of his engine while rounding a curve in the track and allowing the fireman to stoke the engine, thereby leaving the track unobserved from the left side of the engine, although the better view ahead could be had from that side, if negligent, are not the proximate cause of his death, resulting from a head-on collision with another train, caused by the negligence of the company, where the decedent could not have prevented the collision had a look-out been maintained from the left side.

3. DAMAGES. *Verdict not excessive. Death.*

Facts of the case considered and a verdict in plaintiff's favor, awarding twenty-two thousand five hundred dollars as damages for the wrongful death of a person, adjudged not excessive.

FROM the circuit court of Wilkinson county.

HON. MOYSE H. WILKINSON, Judge.

Mrs. Farr and others, appellees were plaintiffs in the court below; the railroad company, appellant, was defendant there. From a judgment for $22,500, in plaintiffs' favor the defendant appealed to the supreme court.

The facts are as follows: The suit was for the alleged wrongful death of John Farr, an engineer in defendant's service. The train on which Farr was engineer was known as "Extra No. 362," and it was proceeding southward from Vicksburg under orders, when it made a head-on collision with north-bound train, No. 78. The collision occurred at a point in the road where there was a curve in the track around the point of a hill. The curve was to the left, and the engineer, being seated on the right side of the cab, failed to see the approaching train until within a short distance of it. At the time of the collision the fireman was engaged in stoking his engine, and did not see the approaching engine, in time to prevent the accident. Farr and the fireman both jumped from the train. Farr was killed under the wreckage, and the fireman was severely injured. The declaration alleged that the cause of the accident was the failure on the part of the telegraph operator at Harriston to deliver to the conductor and engineer of north-bound train No. 78 telegraphic orders

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Brief for appellees.

which had been received to hold said train at Harriston until Extra No. 362 could reach that station. It developed on the trial that the conductor on train No. 78 went into the telegraph office at Harriston for orders, and the telegraph operator instead of delivering the orders to him, and having same read aloud, as required by the rules of the company, laid three dispatches on a table in front of the conductor, who when he left the office failed to take with him one of the dispatches, the order requiring him to meet No. 362 at that station. After the accident the operator abandoned his post. The railroad company contended that there was a variance between the allegations of the declaration and the proof, in this, the declaration predicated negligence of the acts of the telegraph operator while the evidence showed that there was negligence on the part of the conductor in not taking his orders from the table; and further contended that Farr was guilty of contributory negligence in not keeping a proper lookout from his cab at the point of collision.

Mayes & Longstreet, for appellant.

J. McC. Martin, for appellees.

[The reporter has been unable to find the briefs of counsel in this case.]

FLETCHER, J., delivered the opinion of the court.

Appellant assigns two reason why the judgment in this case should be reversed. It is said that there is a variance, because the declaration counts upon the negligence of the telegraph operator at Harriston, whereas the proof discloses that the accident was attributable to the negligence of the conductor on the north-bound train. We cannot yield to this contention. The point is highly technical, and should not operate to reverse the judgment, unless the variance is clearly shown. Here we have no doubt that the operator was gravely delinquent in the discharge of duty. There is no pretense that he delivered the train orders in the way

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prescribed by the rules of the company. Especially was he derelict in failing to see that the conductor, in his presence, read his orders aloud; this being a most important regulation, designed to preclude all possibility of mistake. The conduct of the operator in abandoning his post after the wreck without waiting for any investigation is an admission that he was at fault. If it be conceded that the conductor was in some degree negligent, still it remains true beyond question that the accident would not have happened, had the operator performed his full duty. We think, the proof, in any practical view of the matter, conformed to the averments of the declaration.

In the second place, it is insisted that the case should have gone to the jury on the question of contributory negligence. It is shown without contradiction that the engineer at the time of the collision was at his usual post of duty, keeping a lookout, but that his view was obstructed by the contour of the hill, around which the track curved. It is shown that the fireman, whose position on the left of the locomotive placed him on the inside of the curve, was engaged in his primary duty of coaling his engine. The argument is that the engineer should have left his own position and kept watch from the left side. But, had he done so, it is shown that he could not have stopped his train in time to prevent the accident. He might have jumped from the engine sooner than he did, but the result would probably have been the same. As a matter of fact he seems to have jumped, but with disastrous results. If we concede that he was negligent, that negligence certainly did not contribute proximately to the injury, which was caused alone by the carelessness of the company's servants other than the unfortunate engineer.

There is no complaint as to the amount of the verdict, nor, indeed, could there be.

Affirmed.

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Brief for appellant.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY v. LEWIS L. COBB.

[48 South. 522.]

RAILROADS. *Master and servant. Servant's injuries. Infants. Rule of company touching employment. Disuse. False affidavit of age.*

Where an infant employe of a railroad company was injured in the course of his employment by the negligence of the company, his infancy in no way contributing thereto, a much disused rule of the company forbidding the employment of infants and an affidavit, made by the plaintiff when seeking the employment, falsely affirming that he was then twenty-one years of age, do not constitute a defense.

2. DAMAGES. *Verdict excessive. Personal injuries.*

Facts of the case considered and a verdict in plaintiff's favor awarding twenty-five thousand dollars as damages for personal injuries adjudged excessive.

FROM the circuit court of Wilkinson County.

HON. MOYSE H. WILKINSON, Judge.

Cobb, appellee, was plaintiff in the court below; the railroad company, appellant, was defendant there. From a judgment in plaintiff's favor for $25,000, the defendant appealed to the supreme court. The facts are sufficiently stated in the opinion of the court and in the case therein mentioned, *ante,* p. 557, as being a companion to this one.

Mayes & Longstreet, for appellant.

Our first contention in this case is that on the trial below the whole case was tried on an erroneous theory; which theory was that, in as much as this man, when injured, was serving as fireman, he was entitled to the rule of diligence and measure of protection which under the constitution and laws of this state is now accorded to employes engaged in the discharge of their duty.

But we submit that the facts of the case were such that plain-

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tiff was not so entitled, and the whole case was consequently tried on an erroneous theory.

The controlling fact under this head was that the plaintiff was a minor. He procured himself to be employed in a responsible position intentionally, deliberately, and by a fraud practiced upon the company in stating that he was of age, and not only so stating, but in swearing to the statement. That this was true is not questioned; he himself expressly admitted it on cross-examination, and stated that he did it for the reason that "I did not give my correct age, because I knew it would not do," and stated that he did it in order to get employed, and that "I had to give it in that way before I could go on the road."

We have here, then, a case in which the plaintiff having reached years of discretion deliberately perpetrated a fraud upon the company. He did not misstate his age because of any misunderstanding or want of appreciation of the materiality of the misstatement. His own testimony shows that he knew there was an inflexible rule which would have excluded him from employment in that capacity, and he not only told a lie, but he swore to it, in order to avoid that rule and obtrude himself into this particular employment where he was not wanted, and where he admits that he would not have been employed if his age had been known.

This is no new legal proposition. It has been fully considered and settled by the courts, and the settlement of it is in the interest of public safety. See: *Norfolk, etc., R. Co. v. Bondurant,* 59 S. E. 1091; *Fitzmaurice v. New York, etc., Co.,* 6 L. R. A. (N. S.) 1146, and case note thereto, and note in 7 Am. & Eng. Ann. Cases, 587; 4 Elliott on Railroads, sections 1604 and 1609.

The court erred in giving the peremptory instruction for the plaintiff. By the pleadings in this cause an issue was expressly made that Cobb came to his injury by his own contributory negligence and that of Farr, in not keeping a proper look out; that had they done so, they could have seen the approach of No. 78,

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in time to have averted the collision, or, at least, to have averted the fatal consequences to Farr and the injury to Cobb.

A very significant fact in this case is that both the engineer and the fireman of the other train saw plaintiff's train when they were four hundred yards apart, and they had time to apply the brakes and jump off and escape in safety.

That the negligence of the engineer Farr in failing to keep an alert look out as he should have done when he must have seen and known that Cobb was engaged in stoking his engine while going around the curve, will be imputed to Cobb. See *Evans v. Railway Co.*, 70 Miss. 527; *Farquhar v. Alabama, etc., R. Co.*, 78 Miss. 193.

J. McC. Martin, for appellee.

Suppose a fraud had been imposed on appellant by appellee in the statement of his age. What injury has been done appellant by reason of such fact? No negligence, on the part of appellee caused the collision of the two trains. It was the negligence of Lewis in another department from and in the control of the very train which collided. Can appellant, then, be heard to say: Yes, I did wrong whereby appellee was injured, but I should not suffer the penalty of my wrong, because he was a minor, and in applying for a position with me misstated his age. Certainly this would be a clear case of appellant taking advantage of its own wrong. The minority of appellee had nothing whatever to do with his being injured. Any other person, an adult, would have been hurt, in the same way.

The cases cited by appellant, towit: *Norfolk, etc., R. Co. v. Bondurant*, 59 S. E. 1091; *Fitzmaurice v. New York, etc., Co.*, 6 L. R. A. (N. S.) 1146 and cases in note thereto, along with note in 7 Am. & Eng. Ann. Cases, 587; and 4 Elliott on Railroads, Sections 1604 and 1609, all refer to frauds practiced by persons to obtain either reduced fare, or to secure transportation without fare at all. Hence they really have no bearing on the question involved here. In said line of cases, fraud was

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practiced, injury came to the fraud doer, and an effort was made to hold the carrier. The courts held in such cases that getting free transportation, or reduced fare by such fraudulent representation, the plaintiffs could not maintain an action for damages sustained.

FLETCHER, J., delivered the opinion of the court.

This case is a companion to that of *Yazoo, etc., R. Co. v. Farr, ante,* 557, 48 South. 520. This appellee was fireman on the locomative of which Farr was engineer. Certain questions common to both cases are briefly discussed in the opinion in that case. There is, however, one question peculiar to this case which merits some attention. The appellee is a minor, and, of course, was not of age when he applied for and obtained employment with the railroad company. It appears from the proof that at the time of his making application for employment he made affidavit that he was twenty-one years of age. It is, therefore, ingeniously and forcibly argued that the youth would not have been employed but for this misrepresentation as to age; that as a consequence of this fact the fireman never became entitled to the protection which the law throws around an employee; but that he was a mere trespasser, to whom the company owed no duty, except not to do him a willful injury. This view does not seem to have been presented to the court below, and the testimony adduced on this point was manifestly directed to the view that by proving these misrepresentations the credibility of the plaintiff was thereby affected.

Assuming, however, that the appellant is entitled to present the question to this court, we are bound to say that this theory finds some support in the Virginia case of *Norfolk & W. Ry. Co. v. Bondurant,* 107 Va. 515, 59 S. E. 1091, 15 L. R. A. (N. S.), 443, 122 Am. St. Rep. 867. That case does hold, following an alleged analogy to the familiar passenger cases, that an employe who obtains employment by a misrepresentation as to his age is nothing more than a trespasser. As we shall pres-

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ently point out, we are not called upon to announce positively our accord with, or dissent from, the authority of that case. Suffice it to say that, while it appears to be fairly well established that a passenger who secures transportation at a reduced rate upon a misrepresentation as to a material condition of the contract is entitled to no higher duty from the company than is owing to a trespasser, yet an employe, in our view, falls within quite a distinct category. A passenger, by his fraud, secures an advantage to himself without any corresponding or compensating benefit to the transportation company. The company creates a special and favored class for reasons of its own, and extends the privilege of reduced rates only to individuals of that class. The dishonest passenger who fraudulently secures admission to this class is securing from the company a concession or benefit to which he is clearly not entitled. He is, properly speaking, never a passenger at all, since he has never paid the price necessary to entitle him to the rights of a passenger. But an employe stands in a different attitude. He is a laborer for the company. He is paid for his service at exactly what the service is worth, and in this regard it can make no difference to the company that the employe is a minor and has misrepresented his age. It is not pretended, at least in this case, that the plaintiff was not a competent and skilled employe, or that his minority in any way contributed to the accident. These considerations and others that will readily suggest themselves move us to say that, were we driven to decide the precise question we would follow the Virginia case, if at all, with great reluctance.

But there is another view which we think sufficient. We have stated that the point under consideration was not distinctly made in the court below. This may account for the fact that there was a total failure on the part of the appellant to prove the existence of any rule of the company prohibiting the employment of minors. True, such a rule may be inferred from the fact that young Cobb stated that he misrepresented his

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age for the reason that he would otherwise be denied employment. But it is true that the existence, scope, and terms of the rule are not shown. Further, and of more consequence, it is the undenied testimony of the plaintiff that it is the common practice of the company to employ minors, and that no attention was paid to the rule, if such a one existed. In this state of the record it is clear that the rule was not seriously regarded by the company, and may therefore be held to have been waived. Upon this view, we think a recovery must be upheld.

We think, however, the verdict is grossly excessive. The young man, it is true, is no doubt seriously injured. But we think the injury is not such as will cause permanent disability. We believe that $25,000 is entirely too much. After the most repeated and painstaking examination of the record, we are driven to the conclusion that one-half of that amount will amply compensate the plaintiff for his injuries.

If the plaintiff will remit $12,500, the judgment will be affirmed; otherwise, it will be *reversed* and *remanded*.

CHRISTIANA HOWELL ET AL. v. WILLIAM HILL ET AL.

[48 South. 177.]

1. HOMESTEADS. *Husband's conveyance. Joinder of wife. Code* 1892, § 1983.

A deed to the husband's homestead is not invalid, under Code 1892, § 1983, providing that the husband's deed therefor shall not be valid unless the wife join in its execution if she be living with him, where the husband and wife each executed it, with the knowledge and consent of the other, although they did not execute it at the same time.

2. DEEDS. *Vendor's lien debt. Junior grantee. Code* 1892, § 2444. *Right or estate in land.*

A purchase money debt for land, secured by a vendor's lien, does not pass to a subsequent grantee in a second warranty deed for the same land, executed by the grantor in the first one, the case

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Statement of the case.

not being within Code 1892, § 2444, providing that where a grantor does not own the entire estate which he purports to convey his deed shall nevertheless invest the grantee with whatever "right or estate" he may have had in the lands.

FROM the chancery court of, first district, Yalobusha county. HON. ISAAC T. BLOUNT, Chancellor.

Hill and another, appellees, were complainants in the court below: Mrs. Howell and others, appellees, were defendants there. From a decree in complainants' favor defendants appealed to the supreme court.

The land in controversy was the homestead of Elijah Bardwell who with his wife was living thereon in September 1904. During that month, in consideration of $400, wholly on credit, he signed and acknowledged a deed conveying the same to his son, William W. Bardwell, the father having a lien to secure the purchase money. The deed not having been previously executed by the grantor's wife, she, in May, 1905, signed and acknowledged the same. Each of the grantors, the husband and wife, signed and acknowledged the deed by the consent of the other and the deed, so signed, was delivered and properly recorded.

Afterwards, in the autumn of 1905, the grantee therein, William W. Bardwell, not having paid any part of the purchase money for the lands, gave the deed back to his father, Elijah Bardwell, and appellants contended that this was done in the belief that its return amounted to a reconveyance of the land from William W. Bardwell to Elijah Bardwell but appellees denied any such intent on William W. Bardwell's part. In February, 1906, Elijah Bardwell and wife executed and delivered a deed of gift on its face conveying the land to Howell and wife, appellants, and under this deed, duly recorded in September, 1906, they claimed the lands in suit. In 1907, William W. Bardwell, for $400 cash, sold and conveyed the land to Hill and others, appellees, who afterwards brought this suit to cancel defendants' claims of title and to recover possession of the land.

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Brief for appellants.

The defendants, Howell and wife, appellants, insisted that the deed from Elijah Bardwell and wife to William W. Bardwell was void, because as they claimed it lacked the contemporaneous assent and concurrence of the grantors, husband and wife, to its execution as required, by Code 1892, § 1983, providing that a husband's conveyance of his homestead shall not be valid unless signed by the wife of the owner, and they contended that the statute required that the husband and wife should contemporaneously execute the deed. They urged next, even if the last mentioned deed was valid, appellees were estopped to assert title against appellants because of full knowledge and notice of the true facts of the case that the return of the deed to Elijah Bardwell was intended as a reconveyance, and they further contended that under their deed from Elijah Bardwell and wife they took at least the interest of their grantors in the land—that is a claim for $400 unpaid purchase money, and therefore, had a claim and lien on the land for this unpaid purchase price, since all parties to the suit were fully acquainted with the fact that the purchase money had never been paid, and they made their answer a cross-bill, propounding this claim. They base their last contention on Code 1892, § 2444, which is as follows:

"All alienations and warranties of lands purporting to convey or pass a greater estate than the grantor may lawfully convey or pass, shall operate as alienations or warranties of so much of the right and estate in such lands as the grantor could lawfully convey, but shall not pass or bar the right to the residue of the estate purporting to be conveyed; nor shall the alienation of any particular estate on which a remainder may depend, whether such alienation be by will or other writing, nor the union of such particular estate with the inheritance, by purchase or by descent, so operate, by merger or otherwise, as to defeat, impair, or in any way affect such remainder."

Creekmore & Stone, for appellants.

The deed from Elijah Bardwell and wife, the common source

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of title, to William W. Bardwell, is void on account of the land being a homestead, and the deed not showing contemporaneous assent of husband and wife in its execution; the deed was signed by Elijah Bardwell on September 29, 1904, and by his wife, Elizabeth Bardwell, on May 27, 1905. There are two certificates of acknowledgment; one by the husband on September 29, 1904, the other on May 27, 1905. The deed was void on its face, being squarely in violation of the provisions of our statute regarding conveyances of the homestead. In order to meet this objection, however, the appellees were allowed at the trial to introduce the testimony of Elizabeth Bardwell, who, by the use of many adjectives, and of language that would have done credit to a seasoned lawyer, tells that at the time of her signing and acknowledging the deed in Louisiana, her husband was not only present, but was urgent in the request that she execute the deed. *Duncan v. Moore,* 67 Miss. 136, 7 South. 221; *Hubbard v. Sage Land & Improvement Co.,* 81 Miss. 616, 33 South. 413; *Cummings v. Busby,* 62 Miss. 195; *Gulf, etc., R. Co. v. Singleterry,* 78 Miss. 772, 29 South. 754; *McDonald v. Sanford,* 41 South. 370.

The appellees knew when they obtained the deed from William W. Bardwell, just before the commencement of this suit, the following facts:

First, that William W. Bardwell had not paid any part of the purchase price of the land.

Second, that William W. Bardwell had delivered back to his grantors, Elijah Bardwell and wife, the deed they had executed to him, in an effort to rescind the whole land trade.

Third, that Elijah Bardwell and wife, thinking that they had regained the title to their land, had in good faith conveyed the land to Howell and wife, appellants, and the parties to the said deed had in good faith lived up to the obligations assumed in the said land trade, for more than twelve months. *Kelly v. Wagner,* 61 Miss. 299.

Even if the deed from Elijah Bardwell and wife to William

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Brief for appellee.

W. Bardwell was valid, and they therefore in February, 1906, at the time they made the deed to appellants, had, not the legal title, but only a claim for unpaid purchase money, then certainly Howell and wife took this by the deed made to them. Code 1892, § 2444.

A statute at once so plain in its terms, and so just in its operation, is not apt to be brought frequently before the courts for interpretation. We refer to the case of *Archer v. Yazoo, etc., R. Co.*, 82 Miss. 110, 34 South. 387, as having some application, but we consider it unnecessary to go beyond the words of the statute.

A. T. Smith, for appellees.

1. The execution of the deed by Elijah and Elizabeth Bardwell was one continuous act, till completed by the signing of the wife with the assent and request of the husband. *Duncan v. Moore*, 67 Miss. 136, 7 South. 221.

2. The subsequent pretended deed from Elijah and Elizabeth Bardwell to appellants was void, for the reason that the title to said land was in William W. Bardwell, and said deed passed no interest whatever.

3. The deed to appellees from William W. Bardwell passed all title and interest to said land to said appellees.

4. No principle of law will sustain the answer or cross bill of appellants. "Equity follows law" and courts will not make law to adjust a mere equity, in order to relieve parties from their blunders or mistakes. The mistakes mentioned cannot be pleaded to make out a case for appellants.

5. The evidence of appellants fails to make a legal defense, first, because the same is not sustained by law, second, because the evidence is weak and contradictory. The evidence fails to connect William W. Bardwell, the vendor, with conversations mentioned, and his vendees are protected. *Murdock v. Columbus Insurance Co.*, 59 Miss. 159.

Appellants are contradicted, as to conversations at Hill's

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Opinion of the court.

house by the depositions of Elizabeth Bardwell and Alice Hill and Vera Hill, taken while the case was under advisement, same being taken by agreement and leave of the chancellor and court. On cross-examination, appellant, Christiana Howell, contradicts her previous statement and admits that nothing was said about any land being deeded, in the conversation mentioned.

6. The $400 debt due by William W. Bardwell to Elizabeth Bardwell and the estate of Elijah Bardwell did not pass to appellants. The claim was not assigned to appellants and the courts cannot assign the same. That is for the administrator or heirs at law of Elijah Bardwell and for Elizabeth Bardwell to look after, as well as for the creditors of Elijah and Elizabeth. Appellants cannot assert that claim. The deed to appellants was for "love and affection."

There is no fixed amount due them for anything done by them. Courts cannot fix what they failed to fix or prove.

7. Code 1906, § 2774, can have no further effect than to subject the land to the purchase money, if any, at the suit of the heirs at law. *Kelly v. Wagner*, 61 Miss. 299, cited by appellants is not relevant to the facts of this case. Appellants' brief is unwarranted.

FLETCHER, J., delivered the opinion of the court.

While it is true that the husband signed and acknowledged the deed conveying the homestead in September, and the wife's signature and acknowledgment bear date of the May following, yet both signed the same instrument in furtherance of an intention to which there was manifestly a common and contemporaneous assent. The case is totally unlike *Duncan v. Moore*, 67 Miss. 136, 7 South. 221, in which case the alleged assent of the wife was evidenced by a separate deed of conveyance, executed by the wife subsequently to the husband's deed, and made without the husband's consent. In the case before us the wife signed with full knowledge and consent of the husband, and this is surely sufficient.

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Syllabus.

Upon the point made as to the conveyance from Bardwell to Howell operating as an assignment to Howell of Bardwell's lien for the unpaid purchase money, we think it is clear that section 2444 of the Annotated Code of 1892 is without application. That statute deals with an estate in lands, and the right which a vendor has to subject the land sold to the payment of the purchase money is not such a "right or estate in the lands" as this staute contemplates. This debt goes to the personal representative of the deceased vendor, and not to the junior grantee of the lands.

There being no satisfactory evidence of estoppel, the legal title must prevail, and it is clearly shown to be in the appellees.

Affirmed.

JAMES R. MORELAND v. NEWBERGER COTTON COMPANY.

[48 South. 187.]

1. STATUTE OF FRAUDS. *Code* 1906, § 4779. *Parol sale of chattels. Delivery of part. Payment.*

Where, under an oral contract for the sale of cotton for a price exceeding fifty dollars, the purchaser actually received and paid for a part thereof, the case is not within Code 1906, § 4779, providing that a parol contract for the sale of personalty, for the price of fifty dollars or upwards, shall not be allowed to be valid unless the buyer shall receive the same or a part thereof, or shall actually pay or secure the purchase money or a part thereof.

2. SALES. *Delivery. Question for jury.*

Where the question of a delivery of chattels under an agreement to sell is material and, from the facts of the case although shown by undisputed testimony, different conclusions touching it could reasonably be drawn, the case is one for a jury and a peremptory instruction should be denied.

3. SAME. *Trial. Reopening case. Discretion of the court.*

Where, in an action for the price of chattels, defendant's case rested upon the existence of an alleged custom, plaintiff should be permitted to reopen his case, after having rested and a per-

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Brief for appellant.

emptory instruction had been requested by defendant, and to show the non-existence of such custom, if he could; and an abuse of judicial discretion in this regard will be reversible error.

FROM the circuit court of Leflore county.

HON. SYDNEY SMITH, Judge.

Moreland, appellant, assignee of Moreland & Townes, a dissolved copartnership, was plaintiff in the court below; the Newberger Cotton Company, appellee, was defendant there. From a judgment in defendant's favor plaintiff appealed to the supreme court.

The facts are stated in the opinion of the court.

McClurg, Gardner & Whittington, for appellant.

While the contract for sale of the cotton was oral, yet the purchaser actually received and paid a part thereof. Hence the statute of frauds does not apply. *Stonwall Mfg. Co. v. Peek,* 63 Miss. 342.

At any moment after the closing of the trade on the afternoon of October 21, 1903, the appellee had a legal right to have sold the cotton there on the grounds or to have shipped it to Memphis or New Orleans or other cotton center; and the sellers, Moreland and Townes, could not have prevented it. *Ingersoll v. Kendall,* 13 Smed. & M. 611; *Jordan v. Harris,* 31 Miss. 257; *Garland v. Stewart,* 13 Smed. & M. 314.

As regards the question of admissibility of evidence to show custom in method of sales, we refer to the recently decided case of *Postal Telegraph, etc., Co. v. Willis,* 93 Miss. 540, 47 South. 380, showing that the court below erred in admitting the testimony on that subject over the timely objection of appellants. If there had been no other errors committed during the trial, this would be amply sufficient to reverse the judgment, even if the court below had permitted the case to go to the jury and there had been a verdict against the appellant. It is accordingly doubly erroneous for the trial court to have taken from the jury, as it did, the issue and grant the peremptory instruc-

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tion against appellant when there was a conflict in the evidence as to the terms and character of the sale. This appellate court can hardly escape the conviction, on examining the evidence, that the peremptory instruction in favor of appellee was erroneously bottomed on the proof of "custom."

The court below should have permitted the appellant, plaintiff below, to reopen the case and introduce evidence to meet the evidence of appellee, defendant below, on the issue of existence or non-existence of custom. The discretion of the court below was improperly exercised in refusing to permit appellant to do so. *Merchants' Nat. Bank v. Bangs,* 102 Mass. 291.

Whether there was delivery of the cotton sold was essentially a question of fact to be determined by the jury.

Mayes & Longstreet, on the same side.

As stated by our associates, the case of *Stonewall Mfg. Co. v. Peek,* 63 Miss. 342, disposes of any question as to validity of sale under the statute of frauds.

The more serious question here is, whether under the facts the title to the twenty-eight bales of cotton vested in the Newberger Company or whether it remained in the firm of Moreland & Townes; and whether the risk was in the one or the others after the evening of October 21, 1903.

The evidence shows in our opinion a completed agreement which, under the rule expounded by the decisions on this subject, shifted the title into the Newberger Cotton Company and placed the risk of destruction upon the company. It is apparent that all things had been done by the sellers necessary to identify and segregate the goods sold, whereby as incidents to such identification and segregation the quality had been fixed and price determined. The cotton was baled, marked, selected, samples had been taken away by McGarrity, prices had been determined upon, and McGarrity had announced that the cotton was bought, and had sent a telegram to appellee, announcing the purchase

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Brief for appellee.

of the bales, their numbers, price and quality. On the trial however the Newberger Cotton Company tried to get out of liability by showing that it was customary for the sellers of cotton to haul the cotton to the railroad depot, and in regard to cotton which appellee bought, that McGarrity habitually made draft upon the company in favor of the sellers for the purchase price and gave the draft to the sellers attached to railroad bill of lading covering the cotton.

It will be observed that this evidence is not at all inconsistent with the idea of a closed trade on the evening of October 21. The hauling of the cotton from the various places where the bales were when bought by the company was done by the sellers not as a part of the segregation or identification of the property sold but as gratuitous bailment. Comparing a large transaction with a small one, it was very much as if a citizen of a village had gone to his grocer's store and bought a lot of goods which he then selected, accepted and directed to be charged to his account either expressly or by implication, and then left the goods in the store to be sent home by delivery wagon, which delivery the storekeeper agreed to perform.

Under the circumstances, instead of a peremptory instruction being necessary in favor of appellee, the court below should have awarded peremptory instruction in favor of appellant. But if we are mistaken in this, we yet insist that if appellant were not entitled to a peremptory instruction, then neither was appellee; and the court erred in its rulings. *McKay v. Hamblin,* 40 Miss. 474; *Smith v. Sparkman,* 55 Miss. 647: *Baker v. McDonald,* 1 L. R. A. (N. S.) 474; *Arkansas Valley Co. v. Mann,* 130 U. S. 69; *Briggs v. United States,* 140 U. S. 346; *Orr Shoe Co. v. Needles,* 67 Fed. 994; *Laughlin v. Marston,* 78 Wis. 670, 47 N. W. 1058; *Haxall v. Willis,* 15 Grat. 434; *Dyer v. Libby,* 61 Me. 45.

Gwin & Mounger, for appellee.

The peremptory instruction by the court below was properly given, because (1) the verbal contract of sale between McGar-

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rity and Moreland & Townes was invalid under the statute of frauds as to the cotton which was burned; and (2) because there was no delivery of cotton to the Newberger Cotton Company by Moreland & Townes sufficient to pass title so as to place the risk of loss upon the Newberger Cotton Company.

It is undeniable that the contract between McGarrity, agent of the cotton company, and Moreland & Townes was a verbal executory contract, and accordingly invalid under the statute of frauds. The telegram submitted to Moreland by McGarrity and afterward sent to the Newberger Cotton Company by McGarrity was insufficient as a memorandum of sale under the statute because it does not show the seller. *Grafton v. Cummings,* 99 U. S. 100, 25 L. Ed. 366; *Frank v. Eltringham,* 65 Miss. 381; *Rector v. Sauer,* 69 Miss. 235.

The receipt of and payment for the several deliveries comprising such of the cotton as was not burned, occurring after knowledge by the parties concerned as to the destruction of the twenty-eight bales were, in view of the custom and general course of dealings between the parties, obviously for receipt of and in payment for those specific bales so delivered; and not made with intent to receive or pay for the same as being a part of an inseparable whole. Payment for the other bales did not make the company liable to pay for the twenty-eight bales undelivered and burned.

The case of *Stonewall Mfg. Co. v. Peek,* 63 Miss. 342, cited by appellants, involved no question of the destruction of any part of the commodity. But in the case at bar, apart from the fact that the intention of the parties is shown by their course of dealings to have been to receive only the specific cotton delivered in the several lots, the twenty-eight bales now in controversy had been, to the knowledge of all parties at the time of the receipt of the remainder, destroyed by fire and performance of the contract in full rendered impossible. Under the circumstances, where a part of the property has been destroyed, the rule is different from that laid down in *Stonewall*

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Brief for appellee.

Mfg. Co. v. Peek. See Brown on Stat. Frauds, § 334; *Atherton v. Newhall,* (Mass.) 25 Am. Rep. 47; Benjamin on Sales, § 706; *Hinchman v. Lincoln,* 124 U. S. 38.

The words whereby McGarrity agreed to take the cotton and Moreland & Townes agreed to sell it were wholly insufficient in law to pass title. *Shindler v. Houston,* 49 Am. Dec. 316, 334; 29 Am. & Eng. Ency. Law (2d ed.), 981.

But even if the contract should be held valid under the statute of frauds, there was no such delivery of the twenty-eight bales, prior to their destruction, as to vest title in the Newberger Cotton Compnay, and the risk of loss was still upon the sellers when the bales were burned. The facts are undisputed, and accordingly it was within the province of the court and not of the jury to determine whether the facts showed a valid transfer. *Baldwin v. McKay,* 41 Miss. 358; *Hinchman v. Lincoln,* 124 U. S. 38; *Lilienthal v. United States,* 97 U. S. 237; 24 Am. & Eng. Ency. Law (2d ed.), 1048.

There remained several things to be done before title or right of possession should be transferred, and so long as there yet remained anything to be performed the risk of loss remained in the sellers. *Williams v. Sayers,* 79 Miss. 50, 29 South, 995; *Hart v. Foundry Co.,* 72 Miss. 829, 17 South. 769; *Cole v. Bryant,* 73 Miss. 297, 18 South. 665. *Blackwood v. Cudahy Packing Co.,* 9 Am. St. Rep. 199.

The title to be the cotton, at the time of the fire which destroyed the twenty-eight bales, had never passed from McLemore to Moreland & Townes; hence Moreland & Townes could not legally sell it or deliver it to the Newberger Cotton Company. The contract between McLemore and Moreland & Townes was made some ten days or two weeks before the time fixed for the delivery by McLemore to Moreland & Townes; and at the time of making of such contract the cotton had, to a great extent, still to be ginned and put into condition for delivery; payment for the cotton was a condition precedent to its delivery, and before payment should be made, and therefore

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before delivery by McLemore could be made, it was necessary that the weights of the bales should be gone over carefully and ascertained definitely. There was absolutely nothing done between or by McLemore and Moreland & Townes, before the fire, which changed the status of ownership of the cotton from McLemore to Moreland & Townes. Hence it is apparent that the Newberger Cotton Company cannot be chargeable, by purchase from Moreland & Townes, with the ownership at time of the fire. *Ramsey v. Brown,* 77 Miss. 124, 25 South. 151; *Powell v. Russell,* 88 Miss. 549, 41 South. 5; Benjamin on Sales, § 168.

FLETCHER, J., delivered the opinion of the court.

P. P. McLemore, a planter and ginner of Leflore county, was indebted to Moreland & Townes, a mercantile partnership located at Phillipp, and at the beginning of the ginning season of 1903 entered into a written contract with Moreland & Townes by which it was agreed that McLemore should sell and deliver to Moreland & Townes sixty-two bales of cotton at an agreed price of eleven cents per pound, the gin weights to control, delivery to be made on McLemore's yard, and payment to be made after delivery and examination of the weights, as shown by the ginner's books. On October 21, 1903, one McGarrity, a cotton buyer in the employ of the Newberger Cotton Company, appellee here, came to Phillipp and entered into negotiation with Moreland & Townes looking toward the purchase for his principal of whatever cotton Moreland & Townes might have on hand. McGarrity examined and sampled the cotton which was at Phillipp, amounting to eighty-eight bales, and agreed to give eleven and three-eighths cents per pound for the cotton. Upon being informed by Moreland & Townes that they had some sixty-two bales at McLemore's gin, McGarrity and Townes, one of the partners, went to this gin, and these sixty-two bales were examined and sampled. McLemore was present at the gin, and knew that a sale was being negotiated of the

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cotton covered by his written contract with Moreland & Townes. McGarrity, being satisfied with his examination, agreed with Moreland & Townes to take the entire one hundred and fifty bales, including the sixty-two bales at the gin, at an agreed price of eleven and three-eighths cents, and so advised the Newberger Cotton Company by wire; the cipher telegram, when translated, reading:

"We have bought 150 B/C, 25 B/C 1⅛ staple to 1–3/16, nothing below 1⅛ inch, balance 1–3/16 staple, nothing below 1–3/16 inch staple; all strict middling to good middling and good middling to strict midling, at 11⅜ cents, mostly good to strict good middling."

Nothing whatever seems to have been said by either party as to how the cotton should be delivered to the railroad company for transportation or how payment should be made; these details being evidently understood between the parties. Of the cotton at the gin twenty-eight bales were destroyed by fire on the night of October 22. The rest of the one hundred and fifty bales were by Moreland & Townes delivered to the railroad company, consigned to the Newberger Cotton Company, and bills of lading taken therefor. These bills of lading were attached to drafts drawn by McGarrity on the Newberger Cotton Company, payable to Moreland & Townes, who collected same in the usual course of business. After some delay, evidently due to Moreland & Townes' desire to be fully advised as to their legal rights and obligations, they paid McLemore for the twenty-eight bales of burned cotton. The firm having dissolved, and Moreland having by written assignment succeeded to all the rights of the partnership, he brings this suit against the Newberger Cotton Company for the value of the twenty-eight bales at the agreed price of eleven and three-eighths cents per pound.

The action was for cotton sold and actually delivered. On the trial the above facts were disclosed, and it was further shown that it was the custom for the Newberger Cotton Com-

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pany, in purchasing what may be called "railroad cotton"—that is to say, cotton which would naturally be shipped by rail—to pay for same only after delivery to the carrier, and upon presentation of a draft with the railroad bill of lading attached. It was also shown that this custom required the seller to look after this delivery of the cotton to the carrier and the procuring of the bill of lading. It should be stated that McLemore's gin was situated on the railroad, and was provided with a spur or industrial switch, and that cotton shipped from McLemore's was loaded on the car at the gin and bill of lading secured from the agent at Gerin, the most convenient station where an agent was maintained, and this course was pursued with all the bales, except, of course, the twenty-eight that had been burned. There being evidence, as stated, to show the existence of this custom as to delivery and payment, the defendant, at the conclusion of the plaintiff's testimony, made a motion for a peremptory instruction, not introducing any testimony on its own behalf. This motion was fully argued and sustained by the court. After the motion was sustained, but before the jury had entered its formal verdict in accordance with the peremptory charge, plaintiff asked permission to reopen the case and introduce evidence tending to show that "it was not the custom in the section where the cotton is alleged to have been sold to sell the cotton to the cotton buyer uniformly by draft with the bill of lading attached, and that, on the contrary, it was the custom for cotton to be sold and paid for by the cotton buyers at Phillipp and near Phillipp, where the cotton is alleged to have been purchased, by check and draft without bill of lading attached, and that numerous sales were made by plaintiff to defendant in that section where drafts with bill of lading attached were not given, and for which checks or drafts were given without bill of lading being attached for the cotton." This request was denied, and a directed verdict was entered for the defendant. This action of the trial court is defended on two grounds: (1) The contract of sale was invalid

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under the statute of frauds. (2) There was no such delivery of cotton to the Newberger Cotton Company by Moreland & Townes as sufficed to pass the title, so that the cotton was thereafter held at the purchaser's risk.

The first of these contentions need not give us much concern. The statute of frauds by its very terms has no application to sales of personal property where the buyer has received part of the personal property. Here it is undisputed that the defendant had actually received and paid for at least thirty-three bales of the cotton stored at McLemore's gin, and this brings the case squarely within the holding in *Stonewall Mfg. Co. v. Peek,* 63 Miss. 342. We feel certain that the accomplished judge below did not base his peremptory instruction upon any failure to satisfy the statute of frauds.

The second proposition is much more serious. The argument here has two somewhat distinct aspects. It is said in the first place that title to the cotton in controversy had not passed from McLemore to Moreland & Townes, and, this being true, Moreland & Townes could not make delivery to the Newberger people. We think this contention cannot prevail, in the light of the contract between the parties and the testimony as to what happened on the afternoon of October 21st, when McGarrity and Townes visited the gin. It is to be noted that by the terms of the contract delivery was to be made at McLemore's gin, and payment to be made when the cotton was delivered and the gin weights furnished. McLemore testified that he delivered the cotton to Moreland & Townes on that afternoon, and was cognizant of the alleged sale to the Newberger Cotton Company. We observe here that delivery of property sold is often one thing, and payment therefor quite a different thing. We think the contract between these parties, as understood and acted upon by them, meant that payment should not be made until after delivery and examination of the gin weights. In any event, it cannot be said as a matter of law that there was no delivery, as between McLemore and Townes,

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merely because at the time the gin weights had not been submitted. Payment might as well have been deferred by agreement, although required by the contract, if the intention to deliver existed in the minds of all the parties, and this intention we think is clearly shown by this testimony.

Coming, now, to the question of whether delivery was shown to the Newberger Cotton Company, we need hardly repeat the well-understood principle, that this is essentially a question of fact, determined in this case largely by the intention of the parties. We need not consider in this case anything except the single question of delivery. For here nothing remained to be done to transfer the title except to deliver, since the identical cotton had been pointed out, examined, sampled, and priced, and the company notified of the purchase. Now, under ordinary conditions, in the absence of evidence as to the custom between the parties as to placing the cotton by the seller in the hands of the railroad company for shipment and the method of making payment, it would be tolerably clear that the delivery was complete when the identical property sold or attempted to be sold has been pointed out and examined, and the terms and price agreed on. So that we can find no justification for the peremptory instruction in defendant's favor except the custom shown to exist between the parties as to payment and placing the cotton in the possession of the railroad company for transportation. We think this is a delicately balanced question. Let it be granted that this custom is fully proved; what certain deductions are to be drawn therefrom? Can it be certainly said as a matter of law that, because the seller has been accustomed to place the cotton in the hands of the carrier and draw for the price with bill of lading attached, no legal delivery could exist until these things had been done? It can hardly be maintained that the time or method of payment will of themselves control the question of delivery. It may have been, as suggested by counsel, that the seller placed the cotton with the railroad company merely as an act of ac-

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commodation to the buyer, or even that this was an implied condition of the sale, without thereby postponing the delivery until the cotton was deposited with the carrier and bill of lading secured. Might I not agree with a purchaser to take my chattels at an agreed price, with the express understanding that delivery was then completed, but further agree to prepare them for shipment and wait for payment until this bill of lading is issued? To propound this query is to answer it.

What conclusion is to be drawn from the proved facts in this case upon the question as to when the parties intended that delivery should be completed? This is the vital point in the case, and is essentially a question of fact. In this state of the record we are forced to conclude that the learned judge should have permitted plaintiff, even after argument, to reopen his case and prove, if he could, the nonexistence of the custom as to payment, upon the existence of which defendant's whole case rested. The peremptory instruction can be justified only upon the idea that there was no conflict in the testimony, and the plaintiff ought to have been permitted, we think, though the application was out of time, to go before the court and jury upon all the facts of his case. The right of the cause demanded it in this particular case, and we think that the discretion of the court in this particular was not properly exercised. But, aside from this, we do not think a peremptory instruction should have been given, even though there was no conflict in the testimony as to what actually happened between the parties. It is a misconception of the law to say broadly that every case should be taken from the jury merely because there is no conflict in the testimony. The fundamental question here is as to the intention of the parties, and this intention is, of course, to be gathered from the course of dealing between them, the acts performed, and the language uttered at the time the transaction is had. But it is peculiarly for the jury in this precise state of case to say what conclusion should be drawn from all the proven facts and circumstances here in evidence. It is for the

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Statement of the case.

jury to consider what weight shall be given to the custom shown as affecting the fact of delivery. It may be that the evidence is not conflicting; but it may well be characterized as equivocal, and in such case it is for the jury to say what construction is to be put upon the acts of the parties. *Gibbons v. Robinson,* 63 Mich. 146, 29 N. W. 533; *Merchants' Nat. Bank v. Bangs,* 102 Mass. 291; *McLaughlin v. Marston,* 78 Wis. 670, 47 N. W. 1058.

Justice MAYES desires it said on his behalf that, while he concurs in the conclusion that the judgment should be reversed, he is of the opinion that the evidence of the custom between the parties in this case was improperly admitted, and, if admitted, does not even tend to show that delivery was contemplated elsewhere than at the place where the cotton was sold. He thinks that the peremptory instruction should have been for the plaintiff. The other members of the court, however, think that the case is for the jury.

Reversed and remanded.

UNDERWOOD TYPEWRITER COMPANY v. WILLIAM A. TAYLOR.

[48 South. 15.]

JUSTICES OF THE PEACE. *Appeal bond. Time for approval. United States mail.*

Under Code 1906, § 83, providing that an appeal from the judgment of a justice of the peace to the circuit court must be prosecuted within five days after the rendition of the judgment, a failure to deliver an appeal bond to the justice of the peace within that time is not excused by the fact that a proper bond was mailed to the justice of the peace and should have reached him in due course of mail before the expiration of the five days, where it was not received until afterwards because of his absence from home.

FROM the circuit court of Montgomery county.
HON. JOSEPH T. DUNN, Judge.

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Brief for appellant.

The typewriter company, appellant, was plaintiff in the court below; Taylor, appellee, was defendant there. From a judgment in defendant's favor plaintiff appealed to the supreme court.

The plaintiff sued defendant in a justice's court, and on November 23, 1907, a judgment was rendered therein in defendant's favor. The plaintiff on November 27, prepared a bond for appeal to the circuit court and mailed it to the justice of the peace at Duck Hill, where he resided and held his courts, and the bond reached there on November 28 about noon. The justice of the peace was absent from the village the whole of that day, and did not receive the bond until November 29, and he filed it on that day.

In the circuit court, on motion of defendant, the plaintiff's appeal was dismissed because the bond was not given within five days from date of judgment, as required by Code 1906, § 83.

M. B. Grace, for appellant.

It is undisputed that the justice of the peace received the appeal bond immediately upon his return to his home and office, on November 29, and on that day he approved and filed the bond. It is true that the approval and filing of the bond accordingly were on a date subsequent to the five days' period allowed for appeal from the court of a justice of the peace to the circuit court. But it is also true that such delay was not the fault of the appellant, and appellant should not be visited with penalty of dismissal of suit for the delinquincies of the justice of the peace.

"A party ready and willing to comply with the requisites of an appeal cannot be deprived of his right of appeal by the wilful or accidental omission of a justice of the peace. The appeal bond should be filed *nunc pro tunc.*" *Luderbach v. Boyd,* 1 Ashm. (Penn.) 380; *Redus v. Gamble,* 85 Miss. 165, 37 South. 1010; *Read v. Dickinson,* 2 Ashm. (Penn.) 224; *McIlheny v. Holland,* 111 Penn. 634, 5 Atl. 731.

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Opinion of the court.

Code 1906, § 83, providing that "either party may appeal to the circuit court of the county from the judgment of any justice of the peace, if appeal be demanded and bond given within five days after the rendition of the judgment," is not imperative in its language. The word "may" is used instead of the sterner word "shall."

No counsel appeared for the appellee.

FLETCHER, J., delivered the opinion of the court.

We are controlled in this case by *Murff v. Osburn* (Miss.), 24 South. 873. In that case the justice of the peace left home on the day after the rendition of judgment, and was continuously absent from home until the five days had expired, during which time the losing party made repeated visits to the office of the justice with his appeal bond; and yet this court held that his appeal was properly dismissed. Here the bond was sent by mail four days after the adverse judgment was rendered, and, as in the *Osborn case,* the absence of the justice prevented its timely approval. This case is not like *Redus v. Gamble,* 85 Miss. 169, 37 South. 1010, where the justice acted arbitrarily in rejecting a solvent and sufficient bond filed in time, nor like *Winner v. Williams,* 82 Miss. 669, 35 South. 308, where the bond was actually filed within the five days, but not approved in writing.

We do not feel warranted in overruling *Murff v. Osburn,* and the case is therefore *affirmed.*

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Brief for appellants.

BANK OF MEADVILLE v. NORMA M. HARDY.

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[48 South. 731.]

RECEIVERS. *Appointment. Pending cause. Judicial record. Contradiction by parol. Evidence. Chancery practice.*

While a receiver can be appointed only in a pending suit, it is not permissible in the absence of fraud to contradict the record of his appointment by testimony showing that it was made before the suit was begun.

FROM the chancery court of Franklin county.

HON. J. S. HICKS, Chancellor.

Mrs. Hardy, appellee, was complainant in the court below; the Bank of Meadville and others, appellants, were defendants there. From a final decree in complainant's favor the defendants appealed to the supreme court specifically assigning, among other things that their application to vacate the appointment of a receiver was wrongfully denied.

The opinion of the court states the facts.

H. Cassedy, for appellants.

The question here for decision is ,whether or not there was a suit pending in the court below when the learned chancellor of that court appointed the receiver. It is appellants' contention that there was no suit pending. At what time was the appointment of the receiver made? The answer is, when the chancellor rendered his decision, that is, when his mind acted upon the matter placed before him. The appointment of a receiver does not consist in "filing" the written order of the chancellor with the clerk of the court. The "appointment," within the contemplation of the law, is when the chancellor or judge has made and expressed his decision to such effect. The appointment is a mental act; it is the judgment or opinion of the court, and may be reduced to writing, and when reduced

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Brief for appellee.

to writing, the writing is the mere evidence of the mental act of the judge. 1 Black on Judgments, (1st ed.), § 106.

A decree must be rendered before it can be reduced to writing, whether it be interlocutory or final. The order or decree or judgment of the chancellor appointing a receiver must pass through the mental stage, unless the chancellor be an automaton.

But if the above contention be incorrect, appellants yet contend that the appointment of the receiver was void for the reason that no writ of summons had been issued when the order appointing the receiver was signed by the chancellor. Up to the time of issuance of summons to be served upon the necessary parties, the suit was not "pending." "It is well settled that a *lis pendens* begins from service of the subpoena and not from the time of the filing of the bill or issuance of the subpoena." *Burns v. Mandeville,* 26 Miss. 397. See also *Lamblin v. Nye,* 43 Miss. 241; *Allen v. Poole,* 54 Miss. 323, 333.

To authorize the appointment of a receiver there must have been a suit pending. *Hardy v. McClenan,* 53 Miss. 511; *Barber v. Manier,* 71 Miss. 726, 15 South. 890; *Smith v. Valley Dry Goods Co.,* 79 Miss. 266, 30 South. 653.

The case made by the bill and answer did not warrant the retention of the receiver, hence on its merits the decree should be reversed.

Stone Deavours and *Bennett & Torrey,* for appellee.

If the allegations of the bill be considered, it was eminently proper that the learend chancellor of the court below should have appointed the receiver. The record discloses that the order appointing the receiver was not rendered until the day after the filing of the bill praying for such appointment. In the absence of fraud apparent of record (and there is no contention that the procurement of the order for a receiver was fraudulent), this court will not consider the order illegal. *Jones v. Williams,* 62 Miss. 183.

That a receivership was imminently necessary is apparent

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from the allegations of the answer showing that the bank, at the time when the receiver was appointed, was preparing to make an assignment for the benefit of creditors. If such general assignment had been executed, then by statute law, Code 1906, § 120, the assignee would have become a receiver of the court, and the affairs of the bank would have been administered in the chancery court in precisely the same manner in which they are now, under the control of the receiver, being administered. Opposing counsel cannot point out any difference between the result of administration by a receiver and administration by an assignee. The result to all parties concerned would have been the same.

It is apparent that the learned chancellor read the order for the receiver's appointment after it had been drawn up, and that he signed the minutes of the court after the order had been recorded. Can a record, made under the jurisdiction of the chancellor, be in any way subsequently contradicted or controverted? We think that the case of *Jones v. Williams, supra*, settles the question in the negative.

The many cases cited by learned counsel for appellant are not in point. It is true that there must be a case pending in court before a receiver can be appointed in a matter such as is here of record. But, as we have above stated, the receiver was not appointed until after the original bill had been filed.

FLETCHER, J., delivered the opinion of the court.

On or about February 15, 1908, the Bank of Meadville, a corporation, found itself in a failing condition, due partly to the general financial condition of the country and partly to mismanagement on the part of its cashier. Indeed, it is contended by appellants that the cashier was guilty of criminal peculations. However that may be, at a stockholders' meeting held on February 15th it was determined, among other things, that the bank should make a general assignment, since it was deemed impossible that it could be continued as a going con-

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cern. Thereupon Mrs. Norma M. Hardy, who owned certain shares of stock, prepared a bill alleging that she was a stockholder; that at the stockholders' meeting held on February 15th fifty shares of stock, owned as it was claimed by a rival incorporated bank in violation of law, were voted; that the president of the bank had been permitted to withdraw certain collateral, to the injury of general creditors and stockholders; and that a scheme had been devised to reorganize the bank in such a way as to destroy the value of complainant's stock holdings. There were other allegations not now necessary to set out fully. The prayer of the bill was for a receiver, for an injunction against the reorganization scheme, for a cancellation of the stock alleged to be held illegally by the rival bank, for the return of the collaterals alleged to have been improperly withdrawn by the president, and for general relief. This bill was filed at 11:15 o'clock p. m. on February 16th. At 6 o'clock on the morning of February 17th there was filed in the office of the chancery clerk of Franklin county an order, signed by the chancellor, reciting that the foregoing bill of complaint had been presented to him, that it appeared to the court that said bill had already been filed and that the cause made thereby was a pending one, and that an emergency existed which justified the appointment of a receiver without notice. The order appointed a receiver and approved the bond. This order appointing a receiver was dated February 17th. Upon the filing of the decree, the receiver took charge of the assets and property of the bank, and has, for more than a year, been engaged in the discharge of the duties of his office. The defendants to the bill answered, and filed an application to vacate the receivership. From an order overruling the motion to vacate the receivership, the bank of Meadville and its codefendants prosecute this appeal.

Upon the hearing of this application the chancellor made the following statement: "On the 16th day of February, 1908, Truly, an attorney, presented to him (the chancellor) the

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bill of complaint, then unsworn to, and the chancellor and Truly discussed the bill of complaint, as to whether upon its face it was sufficient in its allegations to justify the court in appointing a receiver without notice, and the chancellor expressed himself that it was sufficient, but that he would not appoint a receiver until a bill should be filed. This conference was held about 12 o'clock on Sunday, February 16th. Afterwards Truly and Deavours, solicitors for appellees, met the chancellor, about 7 o'clock p. m. and stated that the bill of complaint had been sent to Meadville to be filed, and presented a draft of the decree, and the bond of the receiver to be appointed, and the bond of the complainant. The chancellor at that time, at 7 o'clock p. m. on the 16th day of February, signed the decree, with the direction that it was not to be filed until after the bill had been filed in the clerk's office in Meadville. It was suggested that the chancellor keep the draft of the decree, and that, when word had been received that the bill of complaint had been filed, the chancellor would then sign the decree, but the chancellor stated that he did not desire to be awakened late at night, and so signed the decree then at 7 o'clock p. m., the 16th, and delivered it to Truly, an attorney and officer of the court, to be filed after the filing of the bill of complaint which directions were complied with, as shown by the record."

It is insisted that the appointment of a receiver was void, since it appears from the above statement of the chancellor that the order appointing the receiver was in fact signed before the bill was filled and before any cause was in fact pending. Therefore appellants invoke the authority of *Hardy v. McClellan,* 53 Miss. 511, *Barber v. Manier,* 71 Miss. 726, 15 South. 890, and *Smith v. Valley Dry Goods Co.,* 79 Miss. 276, 30 South. 653. These cases unquestionably hold, what is universally accepted as the law, that there must be a case pending in court before a receiver is appointed, and that an appointment in advace of the filing of the bill is void. The point before us

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must be considered in the light of the recitals of the order appointing the receiver. Upon its face it shows that the receiver was not appointed until after the bill had been filed, and that in fact there was a cause pending when the appointment was made. It further appears from the order that it was signed on the day after the bill was filed. This order, being duly filed and entered, becomes a judicial record in the cause, which is now sought to be contradicted and overthrown by parol. In this view of the matter, we are face to face with the familiar principle that a judicial record imports absolute verity, and cannot be impeached or contradicted, except for fraud. As a matter of fact, there is no suggestion of fraud in the case under consideration, and no hint thereof in the application to vacate the receivership. So that we have the case of a decree regular on its face, and, if taken as true, rendered in a pending cause after statement of the chancellor contradicting its recitals. We are of the opinion that the valility of the decree cannot be attacked in the statement of the chancellor in determining the question of jurisdiction or the validity of the order. It was held in *Jones, Receiver, v. Williams,* 62 Miss. 183, that the minutes of the circuit court, when signed by the judge, could not be contradicted as to the real date of the adjournment of the court by the affidavit of the judge himself and members of the bar as to when th court id in truth adjourn. It is there said: "Judicial records, required by law to be kept, are said to import unerring verity, and to be conclusive evidence against all the world as to their existence, date, and legal consequences." So in *Childress v. Carley,* 92 Miss. 571, 46 South. 164, it was held that no evidence would be received or considered tending to show that a judgment entry was in fact not made until after the minutes had been signed and the court had adjourned. This case goes fully into the question, and reaffirms with approval the doctrine of *Jones v. Williams, supra.*

The case under consideration falls squarely within the principles of these two cases. The statement of the chancellor is

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directed specifically to the point that, while the decree appointing the receiver bears date of February 17, it was in fact made on the 16th. We have seen that under the authorities cited, in the absence of any fraud, we must look to the record, and to the record alone, for proof of the true date of its execution. The distinction must be kept in mind between an effort to show the error in the court's finding of facts as expressed in the decree and the effort to prove that a decree bearing one date was in fact executed on another date. It may be plausible, and perhaps correctly, argued that parol evidence, or record evidence other than the decree itself, may be received to show that the decree or other erroneously recites that the bill has been filed and that the cause was pending. But, given the right to so contradict the decree, there still remians the impossibility of contradicting the recorded decree as to the date of its rendition. And when we accept as final and indisputable the recital to the effect that the decree was entered on February 17, coupled with the record proof that the bill was filed on the 16th, we must conclusively presume that the receiver was appointed in a pending cause, and that the appointment was not unauthorized.

We attach no importance to the fact that the chancellor, on the hearing of the application to vacate the receivership, made the statement above set out without abjection from either litigant. We are not here concerned so much with questions of procedure and practice as we are with the fundamental postulate that the absolute verity which a judicial record imports cannot be in any wise assailed, except by a showing as to fraud. This court must look to the evidence now before it, and, as we have seen, it is bound by the face of the record, and must disregard wholly the statement of the chancellor, regardless of the circustances under which it was made. The unimpeachable verity of the decree controls the action of this court, precisely as it must have controlled the action of the court below. We conclude, therefore, that there is no merit in the contention that the receivership should have been vacated on account of the

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statement of the chancellor as to the manner and time of the receiver's appointment.

It is earnestly insisted that the decree should be reversed on the merits; that is to say, that the case made by the bill and answer did not warrant the retention of the receiver. We observe, in response to this contention, that the appointment and retention o fa receiver rest largely within the discretion of the chancellor. The allegations of the bill and the admissions of the answer convince us that the bank was in a failing condition, and that both parties to the controversy were desirous of having its affairs administered by the chancery court. The only difference was ats o method; the one faction contending for an assignee, and the other for a receiver. The result is practically the same, since both can act only under the specific direction of the ourt. This being the conceded status of the matter, we cannot see how appellants' rights can possibly suffer b ythe retention of a receiver, or what just cause can exist for displacing him. We must decline, in this state of the case, to interfere with the exercise of the chancellor's discretion.

Affirmed.

WHITFIELD, C. J., delivered the following specially concurring opinion:

I concur in the result reached in this case, and in the opinion in all respects save one, and that is this: I do not think that the case of *Childress v. Carley,* 92 Miss. 571, 46 South. 164, has any application whatever to the facts of this case, and I adhere fully to my dissenting opinion in that case as the sound view of the law, on the facts of that case. In this case now before us, the chancellor did read the application for a receiver, and did sign it, and did sign the minutes of the court in reference to it. In other words, the chancellor read the order after it was drawn up, and the minutes of the court relating thereto, and signed both; and the effort here is to contradict a record concededly made by the chancellor himself. In the *Childress-Carley case*

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Statement of the case.

the circuit judge never saw the pretended minutes, never had them drawn up, never read them and never signed them. The effort in that case was not to contradict a record, but to show that the pretended record never had any existence. The effort here, in this case, is to contradict, by parol testimony, the recitations in an admitted record. This case, in my judgment, is controlled on this point by the case of *Jones v. Williams,* 62 Miss. 183.

EUGENE C. ADAMS v. BANK OF MEADVILLE.

[48 South. 831.]

RECEIVERS. *Attaching creditors. Priority.*

Where an attaching creditor, after judgment in his favor, moved the chancery court for an order directing its receiver, having custody of the attached and other property of the defendant, to pay his debt or release the property attached, it was not error to deny his motion, in the absence of all evidence touching liens thereon in favor of other creditors, although the attachment was levied before the receiver was appointed.

FROM the chancery court of Franklin county.

HON. J. S. HICKS, Chancellor.

Adams, the appellant, was complainant in the court below and the Bank of Meadville, appellee, was defendant there. From a decree in favor of defendant complainant appealed to the supreme court. The opinion states the facts.

McKnight & McKnight, counsel for appellant. Appellant's application for an order directing the receiver either to make settlement or to release the property levied on, should have been granted by the court below. The appointment of the receiver was illegal because made before the suit was begun. The decree appointing the receiver was signed by the learned chancellor at about 7 o'clock on the afternoon of February 16, 1908. If the

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Opinion of the court.

signing of such decree constitutes the appointment of a receiver, then such appointment was void inasmuch as the case was not pending in court. *Hardy v. McClellan,* 53 Miss. 511; *Barker v. Vanier,* 71 Miss. 726; *Presley v. Harrison,* 102 Ind. 14; Beach on Receivers, § 17; *Smith v. Drygoods Co.,* 79 Miss. 276, 30 South. 653.

If the appointment of the receiver was to become effective from the filing of the order of appointment, after the filing of the bill, as directed by the chancellor, then, since said decree of appointment was entered at 6 o'clock on the morning of February 17, such appointment was made two hours subsequently to the levy of the attachment which had been made at 4 o'clock on the morning of that day. It follows therefore that the levy of the attachment was prior to the appointment of the receiver.

No counsel appeared for the appellee.

FLETCHER, J., delivered the opinion of the court.

Appellant, a creditor of the Bank of Meadville, a failing institution, sued out an attachment against the bank and levied on certain property here in controversy. This attachment was levied at 4 o'clock on the morning of February 17. At 11 o'clock on the evening of February 16th a bill had been filed against the bank by Mrs. Norma M. Hardy, praying among other things for the appointment of a receiver. The decree appointing a receiver was filed at 6 o'clock on the morning of February 17th, and the receiver so appointed took charge of the property in controversy. By leave of the chancery court in which the receivership proceedings are pending, the plaintiff in attachment prosecuted his suit to final judgment. Thereupon Adams applied to the chancery court for an order directing the receiver to pay his debt, or in default thereof to release the property levied on, that a sufficiency thereof might be sold to satisfy his judgment. This application was denied by the chancery court, and Adams appealed.

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Brief for appellant.

Appellant contends in the first place that he should prevail, for the reason that the appointment of the receiver was illegal, because made before the suit was begun. This contention is disposed of in the case of *Bank of Meadville v. Hardy, ante,* p. 587, 48 South. 731, in which case the validity of this precise appointment is upheld upon grounds fully set forth in the opinion in that case. In the second place, it is insisted that appellant should prevail because his attachment was levied before the decree appointing the receiver was filed, and that for this reason his right to subject the property is superior to the receiver's right to possession. It is sufficient to say that on this meagre record we cannot say that the chancellor was wrong. There is no showing here as to the prior right of the attaching creditor. For all we can tell from this record, this very property may be subject to mortgages, attachments, or other liens which are prior in time or superior in right to the claim of appellant. We cannot know what consideration controlled the chancellor in denying the application. We can only say now that this case must be developed further on the proof before we are called upon to decide between this creditor and others in respect to property the true status of which is left in doubt.

Affirmed and remanded.

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LUCY CARPER v. SAMSON CARPER ET AL.

[48 South. 186.]

DIVORCE. *Alimony. Enforcement of decree. Contempt proceedings. Imprisonment for debt.*

Where, in a divorce suit joined with a proceeding in the nature of an attachment in chancery for alimony, the complainant wife obtained a decree against the defendant husband for alimony *pendente lite* and suit money which ordered the husband's codefendants to pay into court the sums admitted by them to be due the husband, the codefendants, debtors of the husband, cannot be adjudged in contempt of court for failure to make payment as directed.

FROM the chancery court of Alcorn county.

HON. JOHN QUITMAN ROBBINS, Chancellor.

Mrs. Carper, appellant, was complainant in the court below; Carper, her husband, and others, appellees, were defendants there. The suit was for divorce, alimony and suit money and was besides somewhat in the nature of an attachment in chancery. Deloach and others, debtors of the husband, defendants, were charged with being indebted to the husband and enjoined from paying him. Deloach and other like defendants answered the bill, each admitting an indebtedness to the husband. An interlocutory decree was granted awarding complainant alimony *pendente lite* and suit money, and directing Deloach and others to pay into court the sum admitted by them respectively to be due. The defendant husband failed to pay the decree allowing alimony *pendente lite* and suit money and Deloach and others, debtors of the husband, failed to pay into court the sums which they had admitted were due from them respectively to the husband. Thereafter complainant began proceedings against defendants for contempt of court for failing to make the payments. The court below refused to adjudge the defendant Deloach and others, debtors of the husband, in contempt. From

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the decree dismissing the contempt proceedings against them the complainant appealed to the supreme court.

Lamb & Johnson, for appellant.

Code 1906, § 999, provides that "the supreme, circuit and chancery courts shall have power to fine and imprison any person guilty of a contempt of the court while sitting but the fine shall not exceed one hundred dollars for each offense, nor shall the imprisonment continue longer than thirty days. If any witness refuse to be sworn or to give evidence, or if any officer or person refuse to obey, or perform any rule, order, or judgment of the court, such court shall have power to fine at discretion and imprison such officer or person until he shall give evidence or until the rule, order or judgment shall be complied with." It seems apparent under the facts in this case that the duty of the chancellor is marked out and shown conclusively in this code section. Deloach who had been ordered to pay over to the clerk of the court such sum as he owed to Samson Carper had failed to comply with the requirements of the court to that effect. "Disobedience or resistance to, or a contempt to prevent the execution of, a lawful order, judgment, decree or mandate of the court, is an interference with, or a contempt to obstruct the due administration of justice; and is therefore a contempt. 9 Cyc. 8.

No attempt has been made on the part of the Deloach to explain why the indebtedness shown in his answer was not paid into court. In the case of *Watson v. Williams,* 36 Miss. 341, this court stated that "the power to fine and imprison for contempt from the earliest history of jurisprudence has been regarded as a necessary incident and attribute of a court without which it could no more exist than without a judge. Contempts against the courts, in the administration of their laws are insults offered to the authority of the people themselves, and not to the judges, the humble agents of the law whom they employ in the conduct of their government." See also *Shattuck v. State,* 51 Miss. 55; *Gildersleeve v. Lester,* 68 Hun. 535.

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Opinion of the court.

"Where, under the statute law the court has authority to require the delivery to a receiver of all assets including money, failure to comply with an express requirement of the court for such delivery is contempt." *Ryan v. Kingsberry,* 88 Ga. 361.

In the case of *Eikenberry v. Edwards,* 56 Am. Rep. 360, the defendant was ordered to turn over certain notes to be sold in satisfaction of an execution. He was held to be guilty of contempt for disobedience of the order notwithstanding the fact that the notes were not in his hands, but were instead in the hands of a nonresident of the state, where it was shown that they were under his control. See also *State v. Becht,* 23 Minn. 411; *Re Milburn,* 59 Wis. 24.

No counsel appeared for appellees.

FLETCHER, J., delivered the opinion of the court.

We have no difficulty in reaching the conclusion that the chancellor very properly refused to permit the debtor of the defendant, against whom a decree for alimony *pendente lite* and counsel fees had been rendered, to be harassed with contempt proceedings. He was an ordinary debtor of the respondent, and to punish as a contempt of court his failure to pay his obligation would be nothing more nor less than an imprisonment for debt. He occupies an attitude entirely different from the husband, who after proper inquiry was directed to pay alimony and suit money. Because, upon well-settled principles, the husband can be required to defray these charges or suffer the penalty imposed for contempt of court, it does not follow that the court may extend this authority over third persons who are so unfortunate as to be indebted to the husband. Authorities dealing with trustees in charge of specific funds, or persons having the control of specific property, have no application to a mere indebtedness, which can never be treated as a fund under the control of the court. *Affirmed.*

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Brief for appellant.

WIRT ADAMS, STATE REVENUE AGENT, v. VICKSBURG WATERWORKS COMPANY.

[47 South. 530.]

TAXATION. *Assessment. Description of property. "Capital invested in merchandise and manufacturing."*

An assessment for taxation of a waterworks company for "capital invested in merchandise and manufacturing" includes its pipes, hydrants, etc., but not its solvent credits.

FROM the circuit court of Warren county.

HON. JNO. N. BUSH, Judge.

Adams, state revenue agent, appellant, was plaintiff in the court below; the Waterworks Company, appellee, was defendant there. The object of the suit was to have the defendant, Waterworks Company, assessed for back taxes. From a decision partly adverse to the plaintiff he appealed to the supreme court and defendant prosecuted a cross appeal from that part of the decree adverse to it. The facts are sufficiently apparent from the opinion of the court.

Bryson & Dabney, for appellant and cross appellee.

The revenue agent prosecuted an appeal from so much of this judgment as excluded the assessment of mains, pipes, hydrants, detached machinery, etc., and the waterworks company prosecuted a cross appeal from so much of the same as sustained the assessment of solvent credits.

The assignment of errors filed by the revenue agent raises one question only, to wit: Did the assessment as given in by the waterworks company of "capital invested in merchandise and manufacturing" include the mains, pipes, hydrants, etc.? The court below held that it did and this is assigned for error.

The assignment of error on the cross appeal raises only one question, to wit: did the assessment of "capital invested in mer-

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chandise and manufacturing" include and embrace the solvent credits? The court below held that it did not and this the appellee, cross appellant, assigned as error.

We shall not repeat the argument but merely refer the court to our brief in the case of *Adams v. Bullock, ante,* p. 27.

McLaurin, Armistead & Brien, for appellee and cross appellant.

It is admitted by the demurrers that the capital stock paid in at its market value, of the appellee, a corporation, was properly listed to the assessor and that the assessor placed said assessment on the assessment rolls of Warren county under the items mentioned in the statutory list designated as "capital invested in merchandise and manufacturing," which assessment was approved by the board of supervisors and the taxes paid to the state and county on this amount of capital invested in the business of the corporation, which was furnishing water to the city of Vicksburg and its inhabitants.

The court will notice from an inspection of the record that it is an attempt to ignore the statutory method of the taxation of private corporations by listing the capital stock paid in, and its market value and who owns the shares thereof, and to assess said corporate property not according to the scheme provided by the statute, but as the property of an individual, and the revenue agent proceeds to assess: First—The franchise of this corporation; then its mains, pipes, hydrants, detached machinery, pumps, tools, implements, etc., separately, notwithstanding the fact that the record admits and there is no issue in the case, that the corporation did list its capital stock to the assessor and paid on the amount of money employed in its business; and notwithstanding it is admitted in the record that the corporation did assess its capital stock and the market value thereof, as required by law, it is attempted in this record to also reassess its solvent credits consisting of open accounts, money loaned, money on hand, etc., as found in the notice.

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Brief for appellee.

We have therefore before us an effort on the part of the revenue agent to ignore what this court had distinctly held in the *State v. Simmons,* 70 Miss. 485, 12 South. 477 and *Bank of Oxford v. Town of Oxford,* 70 Miss. 504, 12 South. 203. In *State v. Simmons,* the court on page 501 said:

"Though as we have said, the details of the plan of taxing corporations are left somewhat uncertain by our laws, it is obvious that the purpose is to tax under the comprehensive designation of corporate stock, as its market value, all species of property owned by the corporation, whatever, enters as a factor in determining its value."

And at the foot of the page the court further says:

"Values, when fixed by the conjoint action of the citizen and the constituted authorities, cannot again be made the subject of controversy between the state and the citizen, but are definitely and conclusivley fixed by the final action upon the assessment rolls according to law."

This case of the *State v. Simmons* is distinctly upheld in the majority of opinion in the case of *Revenue Agent v. Clark,* 80 Miss. 150, 31 South. 216, where the court says:

"The doctrine of *State v. Simmons,* 70 Miss. 490, is a wholesome doctrine on this point and will be firmly upheld by us in all proper cases."

And on page 153 of the same opinion, the court further says, speaking of what the legislature intended, that

"It did intend and provide that as to the value of the property brought to the attention of the court, its judgment should be conclusive."

And the dissenting opinion of Mr. Justice CALHOON in that case says on page 158:

"As to amount, it is made up of particulars valued in the aggregate, each particular being a factor in the aggregation, escape from taxation or assessment cannot be predicated of any of the factors."

And further on, near the foot of the same page, he says again:

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Brief for appellee.

"They were assessed not specifically but as elements of the amount given as the aggregate."

And at the foot of page 159 condemning the idea that these assessments had to be itemized, the court said:

"It will hardly be contended that one who had given in . . . amount of capital employed in merchandise or manufacturing, filling out the blanks with definite sums, is liable years afterwards to be reassessed as to these things."

We ask the court how can the taxpayer be protected from being reassessed repeatedly if the contention of appellant is true, because of the failure of the constituted authorities of law who fix the assessment and fix its designation on the assessment roll if the revenue agent can come along after the board has acted on the assessment approving the roll and the taxes have been paid, all that is due to the state and county, and then say, notwithstanding, Mr. Taxpayer, you have paid the taxes and assessment fully covering the market value of all the capital stock of your corporation, still because it is not listed right on the assessment roll, I, as agent of the state, will reassess you and make you pay this amount over again?

Surely the state of Mississippi wants none of its citizens to be treated in this way. The good morals of the proposition is shocking to the mind of any fair-minded man.

A further answer to this is that it does not fall within the powers of the revenue agent because, under such circumstances as is admitted in this record the appellee's property had not "escaped taxation by reason of being assessed." *Adams v. Luce,* 87 Miss. 220; *Panola County v. Carrier,* 92 Miss. 148.

It is but an effort to ignore the corporate assessment scheme of joint stock companies by the market value of their capital stock and assess each item making up the market value of the capital stock, such as its franchise, earnings, profits and dividends; deposits in bank and capital employed.

As was said in *Farrington v. Tennessee,* 95 U. S. 679, such mode of taxation of corporate interests may be effected, but the

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court in discussing this case in the case of *State v. Simmons*, 70 Miss. 501, distinctly says that such a mode of taxing corporate stock and its market value by taxing the separate items that make up its market value, is not the plan of taxing corporations adopted by the laws of the state of Mississippi and condemns exactly what was sought to be done in this case.

The court below erred in assessing appellee with solvent credits for the years that the record showed it had paid on the market value of its capital stock, because the solvent credits of a corporation necessarily determine the market value of its capital stock. The solvent credits may be the very fund that might make up the capital stock worth two or three for one, and if that value had been placed upon the assessment roll as capital employed in that business and the taxes paid on it to the state and county, which is admitted by this record and so found by the court, surely it cannot be contended that the solvent credits can be assessed after the capital stock of the corporation has been paid on at its market value. This is but one of the items that make up the market value.

It is insisted by appellant, the revenue agent, that notwithstanding the capital stock had been paid on at its market value, as shown by this record and admitted on demurrer, still they can assess the mains, pipes, hyrants, pumps, detached machinery and all things by which the corporation exercises its powers of furnishing water to the city of Vicksburg and its inhabitants, and this is sought to be done in this record. This, we say, is condemned by the reasoning above that these are but elements of the aggregate amounts and that no assessment can be predicted of any of the factors making up the value of the capital stock.

MAYES, J., delivered the opinion of the court.

The opinion in the case of *Wirt Adams, Revenue Agent, v. Samuel R. Bullock & Co., ante*, 27, 47 South. 527, practically settled all the contentions in this case.

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Opinion of the court.

The Vicksburg Waterworks Company was one of the subsequent owners of the franchise originally granted to Samuel R. Bullock & Co., its successors, etc., and owned the waterworks in question for the years 1901, 1902, and 1903. The object of this suit is to assess for back taxes for the state and county for the years above named, the mains, pipes, hydrants, detached machinery, pumps, implements, etc., which the revenue agent claims escaped taxation for the years 1901, 1902, 1903, and also to assess the waterworks company with solvent credits consisting of open accounts, money loaned, money on hand, etc., for the years 1901, 1902, 1903, 1904, and 1905, also claimed by the revenue agent not to have been assessed by the waterworks company for these years.

In this case, as in other cases, we shall not set out the pleadings, since the question to be decided is not to be determined by the applicability of any of the pleadings, but on its merits. There is an agreement in the record which shows that the parties agree that the value of the solvent credits belonging to the waterworks company were as follows, to wit: For 1901, nothing; for 1902, $5,000; for 1903, $5,000; for 1904, $25,000; for 1905, $30,000. It is further agreed that the only property which was listed for taxation against the Vicksburg Waterworks Company for the years in question appears on the personal rolls of the county and shows that the waterworks company was assessed as follows: That is to say, only on "capital invested in merchandise and manufacturing," and this only for the years 1901, 1902, and 1903, there being no other assessment of any kind against this company for the years 1904 and 1905, it having conveyed the property to the City Waterworks Company some time in 1903. On the hearing a jury was waived and the questions submitted to the court for decision. The court adjudged that the property listed for taxation under the head of "capital invested in merchandise and manufacturing" included the mains, pipes, hydrants, etc., and ordered the assessment returned by the board of supervisors against this

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specific property to be stricken out, but the court further held that the description above set out did not include the solvent credits, and that same were legally assessable at the agreed value for the years 1902, 1903, 1904, and 1905, excluding the year 1901 because it was agreed that for that year the solvent credits had no value. From this order of the court, the revenue agent appeals as to that part disallowing for taxation the mains, pipes, hydrants, etc., and the Vicksburg Waterworks Company prosecutes a cross appeal from that part of the judgment assessing for taxation the solvent credits.

We think this case should be affirmed on both appeal and cross appeal. As to the direct appeal, the listing of the property as "capital invested in merchandise and manufacturing" must include the pipes, hydrants, etc., as these things necessarily constitute the capital invested in this business. The description in the tax list is meaningless if it does not comprehend this class of property under the facts of this case. But, while this is true, by no sort of distorted definition of the meaning of "capital invested in merchandise and manufacturing" can it be made to comprehend solvent credits. A solvent credit is a thing quite distinct from property designated as "capital invested in merchandise or manufacturing." When listed for taxation, a solvent credit cannot be said to be "capital invested in manufacturing." It is a separate and distinct kind of property, and should be listed as such for taxation.

The judgment is affirmed on direct and cross appeal.

Affirmed.

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JAMES WILSON v. CHALMETT BROWN.

[47 South. 545.]

SUPREME COURT PRACTICE. *Chancery court finding of fact. Absence of testimony.*

The supreme court will not reverse the finding of a fact by the chancery court, where a witness was examined orally in that court and his testimony is not made of record and is not certified to the supreme court.

FROM the chancery court of, first district, Hinds county.

HON. G. GARLAND LYALL, Chancellor.

Brown, appellee, was complainant in the court below; Wilson, appellant, was defendant there. From a decree in complainant's favor defendant appealed to the supreme court.

A statement of the facts of the case additional to what is shown in the opinion of the court is deemed unnecessary in view of the conclusion reached.

Longino & McDowell, for appellant.

Wells & Wells, for appellee.

FLETCHER, J., delivered the opinion of the court.

This case involves only the single question whether the lot deeded by Mary Wilson to her son, Chalmett Brown, was received by way of advancement. The chancellor's notes show that one Ida Bass testified in the case; her testimony being taken orally before the chancellor, presumably by agreement. This testimony is not before us, and we are therefore not able to judge of its effect. It may have been controlling with the chancellor, and we are compelled, in this state of the record, to uphold his finding of fact. *Affirmed.*

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Brief for appellant.

SAMUEL CASTLEMAN ET AL. v. STATE OF MISSISSIPPI.

[47 South. 647.]

1. CHANCERY PRACTICE. *Injunction. Bond. Code* 1906, § 610.
A bond, as required by Code 1906, § 610, is essential to the issuance of an injunction and one issued without it is void.

2. SAME. *Same. Restraining order.*
Where, upon an application for injunction, a citation is issued requiring defendants to show cause why the injunction should not issue, the court cannot also issue a restraining order pending the hearing, as the order to show cause implies that defendant should not be restrained until after hearing.

3. SAME.
A restraining order, upon issuing citation to show cause why an injunction should not be granted, is foreign to the practice in this state.

4. SAME. *Violating injunction. Contempt.*
Where defendants were only charged with contempt for violating a restraining order, and the issues were made upon the violation of that order, they can only be tried on the charge as made; and the fact that the restraining order was issued on a bill amendatory of another bill on which a valid injunction had been granted was immaterial, as the order and bills must be considered separately.

5. SAME.
A restraining order being void, defendant could not be adjudged guilty of contempt for violating it.

FROM the chancery court of Washington county.

HON. PERCY BELL, Chancellor.

Castleman and others, appellants, were adjudged guilty of contempt of court and fined for violating a restraining order, and appealed to the supreme court. The facts are stated in the opinion of the court.

Campbell & Cashin and *William Griffin,* for appellant.

The restraining order was void and ineffectual for want of bond, as required by the statute; and its violation was no con-

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tempt. It is well settled law that where an injunction is void or ineffectual, it is no contempt to violate it, and that where its issuance is made, by order of the court, or by statute, dependent upon filing the bill, or upon giving bond, its issuance without filing the bill or giving bond makes it void and ineffectual. *Diehl v. Friester,* 37 Ohio St. 473; *Winslow v. Nayson,* 113 Mass. 411 *Ex parte Miller,* 129 Ala. 130; S. C., 87 Am. St. Rep. 49; 2 High, Injunctions, 1429; 22 Cyc. 923. A bond is a condition precedent to the issuance of a preliminary injunction (Code 1906, § 610), and, unless there be, in this state, a distinction between a restraining order and a preliminary injunction it necessarily follows that the restraining order in this case was ineffectual, and that, if violated by the appellants, they were not guilty of contempt.

High, and other text writers, distinguish such an order from a preliminary injunction, but only with respect to their duration, stating that a restraining order is intended to have effect until the hearing of an application for a preliminary injunction, and then it becomes *functus officio;* but they do not undertake to trace the history of restraining orders, or to show how such orders, as contradistinguished from preliminary injunctions were brought about. They simply treat them as being in practice in some jurisdictions, and refer to the decisions of those courts, wherein the practice exists, for distinction between them and preliminary injunctions; but it will be found, upon examination, we think, that, in all those jurisdictions the practice of issuing restraining orders as contradistinguished from preliminary injunctions, exists by virtue of statutory provisions, which forbid the granting of preliminary injunctions, without notice or a hearing of the parties, and which expressly authorize the issuance of restraining orders in the interim.

An Act of Congress (sec. 718, Revised Statutes), expressly provides for the issuance of a restraining order, because of a previous act of congress forbidding a preliminary injunction without notice to the parties concerned, and, so far as our re-

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Brief for appellees.

searches extend, statutes of similar import exist in all the states wherein the practice of issuing restraining orders is found.

The very object of our statute, requiring bond as a condition precedent to the issuance of a preliminary injunction, was to prevent injury; and such statute divests the courts of all discretion in that regard.

The chancellor erred in admitting evidence, over complainant's objection, of acts of violation other and different from those that were charged against them in the affidavit, which constitutes the basis of this proceeding.

Mayes & Longstreet, for appellees.

In answer to the first objection stated above, to the last writ or order issued against the Belzoni Oil Mill Company and its officers, that said order or writ was void because no bond had been executed by complainant under Code 1906, § 610, prior to its issuance, and that the same was void and could be safely disregarded by the defendants on that account, we beg to say: That under the course of the pleadings in this case, the execution of a further and additional bond was not necessary. The three bills of complaint being between the same parties practically constitute in a measure one litigation.

The second bill filed by the Yazoo & Mississippi Valley Railroad Company was only to make known the fact that under its view of the contract and the law, Castleman and the Belzoni Oil Company were one and the same; that Castleman had acted throughout as the representative of and for the benefit and advantage of the Belzoni Oil Mill, but that if the Belzoni Oil Mill was attempting to exercise rights in its own name under the conditions that it might be served with notice and brought in and made a party defendant, and that it should be identified with Castleman and that both should stand restrained. This bill was practically a supplemental bill only for the purpose of bringing in a new party in order that that party might be concluded by the final decree in the cause with respect to mat-

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ters in which and about which the rights and liabilities of Castleman and the Belzoni Oil Mill were identified.

Under our practice, where purely restraining orders are not recognized, it is not necessary for a chancellor who has once required a bond in a controversy adequate to cover all damages to require a further and additional bond every time the court makes an order in the nature of a further or additional restraint. In other words, if an injunction is obtained against a principal, and it be then shown that one of his agents is proceeding, and that agent be enjoined, and it be further shown that still a third agent is proceeding under a guise of a different right, but being the same principal, it certainly would not be contended that any extension of the injunction writ and restraining order of the court to these successive agents and subagents would render any writ void which was issued pursuant to the orders of the court in the subsequently ensuing developments of the cause, simply because the court had not in such instance required a separate and distinct bond.

There is another view of the question which makes it certain that the order or writ of injunction or restraining order, whatever it may be termed, was not void and could not be safely disobeyed because of the failure of the defendant to execute and file prior to its issuance an additional bond.

In addition to the rights and powers inherent in our common-law courts, plenary power to grant and order the issuance of remedial writs, or writs of supersedeas, injunction, etc., is expressly granted by Code 1906, § 992.

Can it be maintained in reason or law, that a defendant enjoined from doing a pernicious or illegal thing can throw himself back and say: "I will disregard the order and will of the court, though I have actual knowledge of it, because I have learned of a technical objection that the party applying for the injunction has not given a bond?"

In urging the argument against this so-called restraining order, counsel for appellants have overlooked the fact that the

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fiat of a chancellor or of a judge of the circuit court granting an injunction and restraining certain alleged wrongful acts, has full operative force and influence from the moment the defendant acquires knowledge of the fact of the grant of the writ or the issuance of the fiat. When he has brought home to him information and knowledge that he has been restrained from certain actions, from that instant the duty of obedience to the order and mandate of the court rests on him.

How could the order or the fiat, under this rule, have any validity if a bond must be first executed to render the dictates of the court of any vitality? This rule is recognized by our state.

"It is the duty of the parties to obey the injunction so long as it remains in force. The violation of an injunction is a contempt of the court from which the process issues, and is punishable by it as such. The defendant is bound at his peril to obey the injunction and if he is doubt as to what he may do without violating the injunction, he should ask a modification of it, or a construction of its terms. The punishment imposed is by fine or imprisonment, or both." *Maynard v. Hood,* 68 Ill. 121; *Shirk v. Cox,* 141 Ind. 301; *Wilbur v. Woolley,* 44 Neb. 739.

"To put a person in contempt for violating an injunction, it is necessary that he should have knowledge of the injunction. If, however, he has actual knowledge thereof, he is punishable as for contempt for its violation, although he has not been served with notice. It is altogether immaterial how the defendant acquired the information of the existence of the injunction, when once he has been apprized of the fact, he is legally bound to desist from what he is restrained and inhibited from doing." *Ullman v. Ritter,* 72 Fed. 1000; *Cape May Co. v. Johnson,* 35 N. J. Eq. 422.

MAYES, J., delivered the opinion of the court.

This is an appeal by Castleman and others from an adjudication of the chancery court of Washington county, adjudging

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them guilty of a contempt for violating an order of the court given in an injunction proceeding. In reference to the question being litigated between complainants and defendants, several suits were filed, beginning with the suit filed by the Yazoo & Mississippi Valley Railroad Company against Castleman and the Delta Southern Railway on the 4th day of July, 1906, and numbered on the chancery docket of Washington county as 3,400, followed by the suit of the Belzoni Oil Co. against the Yazoo & Mississippi Valley Railroad Company and numbered 3,454, filed on August 11, 1906, and still further followed by the amended and supplemental bill to No. 3,450, filed on September 6, 1907, by the Yazoo & Mississippi Valley Railroad Company against Castleman, the Belzoni Oil Company, and the Delta Southern Railway. All of these proceedings prayed for injunctive relief. It is claimed that this last bill was simply amendatory of and supplemental to the first bill, filed by the Yazoo & Mississippi Valley Railroad Company against Castleman and the Delta Southern Railway, and is therefore to be treated just as if it was that first bill; but this amendatory and supplemental bill itself prays for injunctive relief, and on its prayer was issued the order which it is charged appellants violated. Bonds were duly executed in all the cases before the issuance of the writ of injunction, except in the case of the supplemental and amended bill, and in that no bond was filed or provided for by the chancellor after the restraining order was authorized.

We do not deem it necessary to follow the different suits begun, since the question of whether or not these parties were guilty of contempt must be determined by the particular proceeding under which it is alleged the contempt occurred and about which they were cited. When the supplemental and amended bill was filed praying for an injunction, the chancellor issued the following order: "The State of Mississippi, to the Delta Southern Railway Company, a corporation, S. Castleman, and the Belzoni Oil Company, a corporation—Greeting:

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Opinion of the court.

You will hereby take notice that an application has this day been made to the undersigned, chancellor of the chancery court of said county, in vacation, for an injunction commanding and enjoining you, your agents, and employees from in any way or manner connecting any railroad track or placing any frog or other appliances for a railroad crossing, or making any railroad connections whatever, for the purpose of crossing or getting onto or using in any manner those certain spur tracks and switches now situated on the property of the Belzoni Oil Company, and claimed to be the property of it and the Yazoo & Mississippi Valley Railroad Company, or from doing any act whatever that will obstruct in any way the use of the said spur tracks and switches by the said Yazoo & Mississippi Valley Railroad Company, and to remove any obstructions or connections made upon or with said spur tracks and switches, and to restore same, said application being made by the said Yazoo & Mississippi Valley Railroad Company, and that a hearing of said application and motion for injunction thereon has been set by me for hearing in my office, in the city of Greenville, Mississippi, on Thursday, the 12th day of September, A. D. 1907, at 9 o'clock a. m. You are therefore commanded hereby to appear at said time and place, in person or by attorneys, then and there to show cause, if any, why said application should not be granted, and said motion sustained, and said injunction granted as prayed; and until the hearing of said motion you are hereby restrained from doing or performing or permitting any of the acts or things herein above set forth."

This order shows that when the application was made no injunction was granted, but citation was issued to the defendants to show cause why an injunction should not be granted, fixing the 12th day of September, 1907, as the day on which same should be heard. After declining to grant the injunction, the chancellor further ordered that until the hearing of the motion the defendants should be "restrained from doing or performing or permitting any of the acts or things done about which

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they were sought to be enjoined." In short, the chancellor declined to issue the injunction on the application without hearing the defendants, yet made an order restraining them from continuing their work, and thereby gave the same effect to the restraining order as would have been given to the injunction if he had granted it. The citation was served on September 7, 1907, requiring the parties to appear and show cause why the injunction should not issue on the 12th day of September following. On the 9th day of September, 1907, one John Pelley made affidavit before the chancellor charging that the defendants had violated the order of the court, and prayed that they be cited for contempt. The affidavit shows that the information filed by Pelley charges the parties with being in contempt for violating the restraining order, and recites as follows, viz.: "That on the 6th day of September, 1907, Hon. Percy Bell, chancellor of the chancery court of said county of Washington, in vacation, did issue and sign, and have delivered to the sheriff of said county to be executed and returned, a certain order of process, a copy of which is filed herewith, attached hereto, and made a part hereof, just as if the same were set out here in full." An agreement shows that the order referred to is the restraining order issued on the 6th day of September. On this affidavit the chancellor issued a citation to the defendants, reciting that it had been made to appear by affidavit of Pelley, that after the issuance and service of the restraining order, on September 7, 1907, the restraining order was violated by Castleman, etc. All of the record shows that the contempt charged was for a violation of the restraining order alone, and that as far as this proceeding is concerned, none of the other proceedings had in this litigation are involved.

We do not deem it necessary to consider the evidence offered to prove the alleged violation of the order, since the controversy must be determined by the validity of the order. We cannot treat this so-called restraining order as an injunction, because the very decree which restrains the parties also declines to issue

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an injunction, and because no bond was given or required to be given, as required by Code 1906, § 610. Before any writ or order can be given the effect of an injunction, by whatever name the writ may be called, it is essential that a bond be required and given; and, if it is not, the injunction is a nullity. Section 610, Code of 1906; *Diehl v. Friester,* 37 Ohio St. 473; *Winslow v. Nayson,* 113 Mass. 411; *Ex parte Miller,* 129 Ala. 130, 30 South. 611, 87 Am. St. Rep. 49.

We are aware that there is authority holding differently; but it is clear that under our statutes these authorities cannot apply, since the statute is express in its declaration that a bond should be filed before an injunction should issue. When an application is made for an injunction, only three courses are open to the judge to whom the application is made. He must grant the injunction, or he must refuse it, or he must issue citation for the parties defendant to appear and show cause why an injunction should not issue. If the last course is pursued, it is of itself a declaration on the part of the judge that in his judgment the defendants should not be molested until they have had a hearing. A citation cannot be issued to show cause, and at the same time and in the same decree a restraining order issued to stop the defendants until they can be heard. If a judge may grant a restraining order for six days, having the effect of an injunction, without bond, he may grant one for a longer period. To uphold this order would be to defeat the requirement of the statute as to bond altogether. A temporary injunction is in effect a restraining order, but no temporary injunction can be issued without bond. A restraining order is not only foreign to our practice, but foreign to the necessities of same. In many jurisdictions a restraining order may be issued; but in the cases which we have examined on this subject it is because of a statute allowing it to be done, and the restraining order always requires a bond, and is very much the same in practice as a temporary injunction. The issuance of the restraining order under the facts of this case was a nullity.

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Brief for appellant.

But it is contended on the part of the state that, though the issuance of the restraining order might be void if it stood alone, and the appellants might not be liable for a contempt for its violation, still they are liable under the facts of this case, because the restraining order was issued on a bill amendatory of and supplemental to another bill filed praying for an injunction, and wherein an injunction had been granted and a bond given. We cannot agree to this contention. For the purpose of this contempt proceeding, each of the bills filed must be treated as independent of the others. The charge against appellants is that they violated the restraining order—that, and that alone. No mention is made in the affidavit or in the citation of the violation of any order of the court save this restraining order. The issue is made upon this, and the facts considered must be upon the issue made. 9 Cyc. p. 47; Ency. Plead. & Prac. 1110, 1112. This order was void, and, being void, the appellants could not be held in contempt for a violation of same. Fletcher on Equity Plead. § 537; High on Injunction, vol. 2, § 1425.

Reversed and dismissed.

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Brief for appellant.

JOHN W. SHOEMAKER v. SAMUEL S. COLEMAN.

[47 South. 649.]

MUNICIPALITIES. *Streets. Obstructions. Abutting owner. Right to sue for removal. Title. Evidence. Public nuisance.*

In a suit by an abutting owner to compel the removal of an obstruction in a street in front of his property:—

(a) Complainant does not have to show a fee simple title to the land claimed by him; he need only show such interest therein as entitles him to ingress to and egress from the property; and

(b) He may maintain the suit where he suffers injury peculiar to himself and where his right of ingress to and egress from the property is impaired; and

(c) It is immaterial that the municipality, having accepted a dedication of the street, had not when the obstruction was erected opened it up its full length.

FROM the chancery court of Lauderdale county.

HON. JAMES L. MCCASKILL, Chancellor.

Coleman, appellee, was complainant in the court below; Shoemaker, appellant, was defendant there. From a decree in complainant's favor defendant appealed to the supreme court.

The opinion of the court states the facts of the case.

Amis & Dunn, for appellant.

The bill alleged that complainant was the owner in fee simple of the property described and alleged to be damaged. This was certainly an essential averment and a vital part of complainant's case. This allegation was denied, and it devolved on the complainant to sustain the allegation by proof. This seems to us to be elementary and too plain to be questioned for a moment.

It is said in the argument by counsel for appellee, that the averment in the bill that complainant was the owner in fee simple was unnecessary; that the same ought to be treated as

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Brief for appellant.

mere surplusage, and that it was sufficient to maintain the bill to prove that complainant had mere color of title, and other necessary elements existing the complainant ought to prevail. We cannot subscribe to this view. The authorities are unanimous on the point that a suit by a private citizen cannot be maintained to abate a public nuisance, unless he can show that he suffers special damage different in kind from that suffered by him in common with the general public. The complainant fully appreciated the force of this rule, and undertook to show special damages to the freehold estate in the property, to wit, that the value thereof was depressed by reason of the existence of the alleged obstruction of the street. We should not overlook the fact, vital here, that the property was unused, vacant land and that the only possible damage which could be inflicted was such damage as might be done to the freehold estate. The complainant claims that he is deprived of putting the property to given purposes, because the mode of ingress thereto and egress therefrom is rendered less convenient by the obstructions. But what about his right to use the land at all for any purpose? He has failed to prove his title, consequently fails to show his right to devote the property to the special purpose indicated, or to any purpose. Ordinarily it is sufficient in trespass to show possession of the *locus in quo* under claim and color of title or to show such title as would enable him to succeed in an action in ejectment. *Railway Co. v. Commonwealth,* 90 Pa. St. 306; *Mahew v. Morton,* 28 Am. Dec. 305, note.

There was no sufficient showing of a dedication of the property in question.

Admitting that there was at some time a valid dedication of the street and avenue in question, to the public use, we are still confronted with the fact that the right to open and to maintain public streets and avenues in the city of Meridian is vested by the charter of said city in the officers thereof, and not in any private citizen. Assuming that the obstructions which are complained of were removed, we ask whether the complain-

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Brief for appellee.

ant's situation would be at all different from what it was when he filed his bill of complaint. He would have no authority to work and open the street himself. These streets are not now opened, have never been, and so far as the court knows, may never be. *Parvonia Land Association v. Temper,* 7 Atl. 423; Elliott on Roads and Streets (2d ed.), 717; *Poythress v. City of Meridian,* 92 Miss. 638, 46 South. 139; *Cram v. City of Laconia,* 57 L. R. A. 282; *Holmes v. Carthell,* 12 Atl. 730; *Shero v. Cary,* 29 N. Y. 58.

J. M. McBeath, for appellee.

The question as to whether or not the streets and avenues involved in this controversy, were ever dedicated as public streets, has been passed on by his court in the case of *Coleman v. Holden,* 88 Miss. 798, 41 South. 374.

By reference to the map dated April 27, 1908, the court will see that the "A" street involved in the instant case, is the same "A" street involved in the case of *Coleman v. Holden.*

Counsel for appellant contend that the right to open and maintain public streets and avenues in the city of Meridian is vested by the charter of said city in the officers thereof and not in any private citizen, but I hardly think they will contend that inactivity on part of the municipal authorities of said city would preclude an abutting owner from asserting his rights as laid down in the *Coleman v. Holden case* and other Mississippi cases.

Counsel for appellant say that they have never been able to find a single authority holding that a private citizen has the right to prevent the obstruction of a highway which has never been opened to public travel. My usually careful friends, counsel for appellant, overlooked the *Coleman v. Holden case,* which is exactly in point, and if they will read the record in that case, they will find that this court held that Coleman was entitled to the use of these unopened and unworked streets to get to and from his property. Wouldn't it be a monstrous proposition

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Brief for appellee.

that one could buy property that had been platted into lots and blocks surrounded by streets and avenues and because the city did not see proper to work these streets, then one owing property in such a survey could bottle up his neighbor until the city board would come to his rescue, or if perchance, the one who was "bottled up" did not stand in favor with the "powers that be" then the condition might exist indefinitely.

Counsel for appellant insist "that appellee has failed utterly to show any special damages such as would entitle him to maintain this suit." But in the case of *Canton Cotton Warehouse Co. v. Potts,* 68 Miss. 637, 10 South. 448, this court held differently.

In that case, the Canton Cotton Warehouse had erected buildings in Franklin street closing the end of same, through which those who patronized the furnished rooms of Mrs. Potts were accustomed to travel. Mrs. Potts filed her bill in the chancery court to remove said obstruction, and praying for damages sustained by reason of said obstructions. The relief prayed for was challenged by demurrer, one of the grounds of which was:

"That the obstructions complained of are, if a nuisance at all, a public nuisance, and that complainant has sustained no special injury authorizing her to maintain any action."

But the court held in that case:

"Though the obstruction of a street by defendant may be a public nuisance and liable to abatement as such, the complainant has sustained such injury, peculiar to herself, as to warrant a private suit," citing *Soltan v. Deheld,* 9 Eng. Law & Eq. 104; *Frank v. Lawrence,* 20 Com. 117; *Conrad v. Smith,* 32 Mich. 429; *Pratt v. Lewis,* 39 Mich. 7; and other authorities.

Counsel for appellee cite *Poythress v. City of Meridian,* 92 Miss. 638, 46 South. 139, as authority for their contention. But that case is not in point. The *Poythress case* is a case where the city closed a street "because it was dangerous to pedestrians," the court holding that the municipal authorities had a

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Opinion of the court.

right to close a street "where it believed that the safety of the public demanded it."

WHITFIELD, C. J., delivered the opinion of the court.

This bill was filed by appellee against the appellant, setting out that appellant had placed certain obstructions in A street and Seventeenth avenue, in the city of Meridian—he owned a lot fronting on Seventeenth avenue on the east and for one hundred feet on A street on the south—causing him great damage peculiar to himself, in that ingress to and egress from his property was greatly interfered with, and in that the value of his said property was greatly depreciated by reason of said obstructions. The prayer was that the court, upon final hearing, should enter a decree compelling the appellant to remove said obstructions from said street and avenue. The bill alleged that the appellee was the owner in fee of his property so abutting on said avenue and street.

The appellant urges that it was the duty of the complainant, in this sort of proceeding, to deraign his title and show a perfect title in fee simple. This is a misconception. This is not a bill to remove clouds from title. Appellee was required to do no more than show that he had such interest in the land as an abutting owner as entitled him to ingress to and egress from his property. We have heretofore held in *Coleman v. Holden,* 88 Miss. 798, 41 South. 374, that even the lessee for a short term could maintain such a suit as this. The appellee shows several deeds by which the property was conveyed to him, and there is no dispute as to the right to the possession of the property, upon which he says he proposes to erect a warehouse.

The appellant next contends that the complainant was not an abutting owner on this street and avenue in such legal sense as to entitle him to this relief. This is entirely too narrow a view. He bases this contention upon the proposition that the obstruction of the street, by the plant in part and in part by piles of lumber, was at a point not opposite exactly to the one

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hundred feet of the lot of appellee fronting and abutting on this street; but the right of ingress to and egress from his lot, both on A street and Seventeenth avenue, was directly obstructed and interfered with seriously by the said obstruction in A street. It may be not quite as directly, but in principle and for all practical purposes as effectually, as could be required for the maintenance of this bill. There is nothing in the case of *Poythress v. Mobile & O. R. Co.*, 92 Miss. 638, 46 South. 139, properly understood, at all in conflict with this view.

It is next insisted very earnestly by the appellant that there is no sufficient proof of the dedication of this avenue and street in this record, whatever may have been the effect of the proof in *Coleman v. Holden*, 88 Miss. 798, 41 South. 374. We have most critically and carefully examined the testimony in this record touching the dedication; but we are unable to agree in this contention of appellant, and it would serve no useful purpose to set out at large the testimony on this subject. It is enough to say that a careful examination of that testimony in this particular record satisfies us thoroughly that there was a dedication of this street and avenue as a street and avenue of the city of Meridian. Counsel for appellant fail to give full effect to the testimony for appellee on this point, and, indeed, to the testimony of the city engineer introduced by himself. It is true that the map referred to by J. W. T. Hamilton was not introduced, but Hamilton testified to the contents of that map; but other maps, based on that and on Ragsdale's survey, are introduced as evidence, and much oral testimony besides, the effect of all of which evidence, taken together, clearly shows that the city accepted this dedication, and recognized this avenue and this street as an avenue and street of the city of Meridian.

A very large part of the argument of learned counsel for appellant is devoted to an attempt to show that, because this street and avenue were not opened in their full length, at the time of the erection of the plant of the appellant, by the city authorities, the appellant had a right to establish his plant in what is

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A street and Seventeenth avenue in part. The principles which control perfectly this branch of the case are set out fully in the case of *Coleman v. Holden,* 88 Miss. 798, 41 South. 374. This street and this avenue are wholly within the corporate limits of the city of Meridian. They had been, as we have shown, dedicated to the city, and the city had accepted the avenue and the street. These blocks and lots had been numbered and laid out with reference to this street and this avenue, and they had been dealt with by the city in various ways from time to time as an avenue and a street of the city of Meridian. The deeds under which the defendant himself claims refer to Ragsdale's survey, and the whole testimony contained in this particular record shows too clearly for disputation that this avenue and this street must be regarded as an avenue and a street of the city of Meridian; it being immaterial that the city did not open up the avenue and the street in their full length until the advancing interest of the city required them to be so opened up. We have given very special attention to the weight and the effect of the testimony on this point, because of the very able argument made by the learned counsel, both at the bar and in his brief; but we are persuaded that a calm review of the evidence in the record will convince the learned counsel for the appellant himself that he failed to attribute to this evidence the full effect to which it is justly entitled on this point.

The learned counsel for appellant then contend that if A street and Seventeenth avenue were a street and avenue of the city of Meridian, and were obstructed, as the testimony shows they were, by appellant, such obstructions constituted a public nuisance, and that an action could not be maintained by appellee, a private citizen, to remove these obstructions, since he would have to show some damage peculiar to himself, not suffered in common by his fellow-citizen. This is a perfectly sound principle of law. But the evidence shows clearly such peculiar damage to this appellee, both in respect to ingress and egress and in respect to special depreciation to his property by

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virtue of these obstructions. So that, without any reference to the case of *Coleman v. Holden,* 88 Miss. 798, 41 South. 374, the evidence in this record establishes the proposition that we have above indicated.

Finally it is insisted earnestly that as to Seventeenth avenue at least this suit must fail, because it is said that avenue is open down to A street, past the appellant's property, where it fronts on Seventeenth avenue; but that avenue is obstructed just below, and that obstruction interferes with travel up Seventeenth avenue, north, by appellee's property. A map is introduced in evidence to show that a street called "New B street" has been opened from Seventeenth avenue, running in a southeasterly direction, and that parties desiring to pass north or south by appellee's property fronting on Seventeenth avenue can go along Old B street to where New B street intersects that street, and by pursuing this circuitous and very inconvenient route, and for a very much greater distance than would be traveled in going directly up Seventeenth avenue as originally laid out, could reach appellee's property where it fronts on Seventeenth avenue. It is shown that the city street committee built a bridge and opened up this New B street; but this is the whole extent of the testimony offered to show that this New B street was opened up by virtue of the authority of the city of Meridian. The city engineer himself testifies, when asked on this point, that he did not know by what authority this New B street was opened up. There is, hence, a failure to satisfactorily show that this New B street ever was laid out by the authority of the city. It seems, from the engineer's testimony, to have been recently done.

It would have been an exceedingly easy matter for the appellant or his predecessors, when this plant was constructed to have investigated the question whether A street and Seventeenth avenue constituted a legal street and avenue of this city. Even if the slighest investigation had been made, it would have been discovered at once that they were. The appellant has nobody to

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blame but himself for building in this street and avenue, and it is asking too much of the court to hold, on the extremely meagre showing on his behalf in this record, that he should be permitted to thus obstruct this street and this avenue of the city of Meridian. If there shall be some expense attendant upon withdrawing his building out of the street onto his own ground, it is simply one of a thousand like instances where care beforehand, which should have been exercised—even the most ordinary care exercised in advance—would have made this expense wholly unnecessary.

The most careful scrutiny of the record leaves us unable to say that the chancellor has erred in any respect, and the decree is accordingly *affirmed.*

CAROLINE L. DICKERSON ET AL. v. FRANCES L. LESLIE.

[47 South. 659.]

1. HOMESTEAD. *Widow's right. Other heirs. Code* 1906, § 1659. *Partition.*

The widow is entitled, under Code 1906, § 1659, so providing, as against his other heirs, to occupy the exempt homestead of her deceased husband during her widowhood and a partition thereof in the absence of her consent will not be granted irrespective of its value.

2. SAME. *Code* 1906, § 2146. *Value limit.*

The provisions of Code 1906, § 2146, exempting a homestead from execution, in so far as they limit its value to a sum not exceeding three thousand dollars, have no application to a controversy between the widow and the other heirs of a deceased homesteader touching her right to occupy the premises and defeat partition.

FROM the chancery court of Bolivar county.

HON. PERCY BELL, Chancellor.

Mrs. Dickerson and others, appellants, were complainants in the court below; Mrs. Leslie, appellee, was defendant there.

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Statement of the case.

From a decree in defendant's favor on the controverted points the complainants appealed to the supreme court.

George W. Leslie, deceased, was the owner in his lifetime of a plantation in Bolivar county, Miss., comprising nine hundred acres of land. On the tract there was a dwelling house, barns, etc., such as are usually found on plantations. Leslie died owing no debts, and left surviving him three children by a prior marriage, the appellants, and a widow, the appellee, by whom he had no children. Appellants, began this suit for partition of the land between the heirs of the decedent in proportion to their respective interests after allotting to the widow and children as tenants in common a tract of land as a homestead in accordance with Code 1906, § 2151, which is as follows:

"The homestead of every citizen entitled to such an exemption, who shall not select or who has improperly selected his homestead by declaration, is designated as follows, viz.: A tract of land in the form of first, a square; or second, a parallelogram if practical, and composed, if practicable, of continuous parcels, and including the dwelling-house, and, if practicable, the other principal buildings, and not to exceed one hundred and sixty acres in area, nor three thousand dollars in value. And in all cases where the homestead may be composed of detached parcels of land, it shall be made up of those nearest the forty-acre or other less tract containing the dwelling-house."

The appellee answered the bill, contending that it was the duty of the court in directing the allotment of the homestead to set apart a tract of land containing the dwelling-house, and consisting of one hundred and sixty acres, regardless of the value thereof, and that she should have the use and occupancy of the same during her widowhood, and that the remainder of the estate of the decedent only should be partitioned. The court below rendered a decree directing the allotment of the homestead in accordance with the contention of the appellee; the decree directing as follows: "And thereupon the said commissioners

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shall allot and set apart to the defendant, Frances H. Leslie, widow of George W. Leslie, deceased, as the homestead of the decedent, George W. Leslie, mentioned in the original bill of complaint on file herein, the homestead as follows, to wit: A tract of land in the form of, first, a square; or, second, a parallelogram, if practicable, and composed, if practicable, of contiguous parcels, and including the dwelling house, and, if practicable, the other principal outbuildings, the same equaling in area one hundred and sixty acre."

The appellants made in writing the following objections to the decree of the chancellor: "The complainants herein object and except to so much of this decree as directs that the homestead, which the commissioners are directed to allot, shall consist of one hundred and sixty acres, designated in the manner therein stated, instead of directing, as provided by the statute, that the said homestead so to be allotted by the said commissioners shall, as provided by law, 'not exceed one hundred and sixty acres in area, nor three thousand dollars in value.' "

The question involved was whether the homestead to be allotted to the widow should be limited in value to $3,000, under Code 1906, § 2146, on the subject of exemptions, or was she entitled to the use and occupancy of the homestead under Code 1906, § 1659, during her widowhood, regardless of its value?

The two sections are as follows:

"2146. Every citizen of this state, male and female, being a householder and having a family, shall be entitled to hold exempt from seizure or sale, under execution or attachment, the land and buildings owned and occupied as a residence by him or her, but the quantity of land shall not exceed one hundred and sixty acres, nor the value thereof, inclusive of improvements * * the sum of $3,000."

"1659. Where a decedent leaves a widow, to whom, with others, his exempt property, real and personal descends, same shall not be subject to partition, or sale for partition during her widowhood, as long as it is occupied or used by the widow, until she consent."

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Brief for appellants.

J. W. Cutrer, for appellants.

The instruction of the court to the commissioners how to make the selection of the homestead, is not in accordance with the law of the state.

The law lays down the manner in which homesteads shall be selected when not selected by the exemptionist, and under no circumstances should commissioners be instructed to make that selection of homestead in any other manner than as provided by law.

Code 1906, § 2151, provides a definite rule applicable in all cases where a prior valid selection for any cause, shall not have been made by an exemptionist before his death. No matter what rule may be made applicable in any other cases, or under any other circumstances, in the state of case exemplified by the statute, no different or variant rule can be made to operate or apply.

Under the code, the two precedent requisites of the homestead to be selected, are made conditional upon practicability.

The third and fourth upon area, not exceeding a certain value. Under no circumstances can any of these requisites or limitations be ignored.

The law defines what the homestead is. The law states most emphatically and positively that the tract of land shall not exceed one hundred and sixty acres in area, nor three thousand dollars in value. Why, in designating the homestead in the present case, the limitation as to acreage should be observed and the limitation as to value ignored and disregarded, is without reason.

Why prevailing stress should be placed on the limitation of one hundred and sixty acres in area, while that upon value is read out of the statute is absolutely beyond comprehension. The legislature of the state has stated just as positively that the homestead shall not exceed three thousand dollars in value, as it has that it should not exceed one hundred and sixty acres in area. It cannot be contended that more than one hundred and

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Brief for appellants.

sixty acres can be set apart as a homestead, should one hundred and sixty acres be less in value than three thousand dollars.

Then it is beyond the reach of logic to prove that there is any greater or controlling reason for allotting a homestead that exceeds three thousand dollars in value, in order only that it may contain one hundred and sixty acres? This peculiar statute contains a positive negation of any such right in this court. "Nor," in the statute follows immediately after the fixing of the maximum area, and limits that area that may be so selected to a maximum valuation not exceeding three thousand dollars.

The precise questions involved and dependent upon this statute have never been before, nor directly determined by this court.

Indeed, it is impossible to see why a statute so plain, so positive, so mandatory can be made the subject-matter of litigation, or why it is that the same was in any manner disregarded by the court below in giving instructions under its terms for the allotment of the homestead in this case.

In delivering the opinion of the court in the case of *Wiseman v. Parker,* 73 Miss. 378, Justice WOODS says:

"The only absolute requirements (of a homestead) are that the land shall not exceed one hundred and sixty acres in area, *nor two thousand dollars in value,* and that the tract allotted shall include the dwelling house." There it is plainly shown that this court attaches as much importance to the limitation as to value as to that of area.

In *Lewis v. White,* 69 Miss. 352, we find this statement in the opinion of the court: "The claim to the homestead exemption in property in common, *is to be regulated and bounded, in extent and value,* just as in every other case."

The whole intention of the legislature was to secure to the citizens residing in the country the shelter of the homestead roof, and the lands contiguous thereto, mapped out and extended and circumscribed at the same time in area, and value, in the very language of the statute.

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Brief for appellee.

The same thing is not true as to urban exemptions and exemptionists. Necessarily the area occupied as such a homestead is exceedingly limited by reason of the locality. The very lot or small parcel occupied as a homestead might become of exceeding value. The house built upon such a lot, was and is not susceptible of division. When an exemptionist shall have selected such a lot and built a home thereon, this home should be preserved to the family. There should never arise the necessity as contemplated by section 2151 for the setting aside or selection of such a homestead.

The homestead as an entirety in existence presents and speaks for itself, "no matter how elegant and costly, be it ever so humble it is still the home."

This home as the court says, perhaps "beautiful and made attractive" by the widow she is entitled to claim for the family as exempt. This is all the court decided in the case of *Moody v. Moody,* 86 Miss. 323. The facts in that case are in no way akin to, nor do they in any way touch upon the facts and issues in this controversy.

Henderson & Magruder, for appellee.

Under Code 1906, § 1659, a surviving widow is entitled to occupy the homestead as it existed during the lifetime of the husband, without reference to its value, the limit of value placed by law on exempt homesteads being solely for the benefit and protection of the creditors and not affecting the rights of a surviving widow to the use and occupation of the homestead against the heirs of the deceased exemptionist. *Moody v. Moody.* 86 Miss. 323, 38 South. 322.

The limitation as to the value placed upon homesteads was for the purpose of protecting the creditors and for preventing them from being defrauded of their just rights, and was not intended to apply in the allotment of a homestead to a widow, when the estate owed no debts. "A law designed to establish a beneficent public policy must be liberally construed in order to completely effectuate the legislative purpose." Ib.

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It would be both illogical and unfair to say that a widow could hold the house in a thickly populated city, the home of her deceased husband worth probably $50,000, and that the homestead of another widow in a rural district must be limited in value. Especially is this true when there are no debts against the estate of the deceased husband.

MAYES, J., delivered the opinion of the court.

This case is controlled by the case of *Moody v. Moody,* 86 Miss. 323, 38 South. 322. The only distinction between this case and that on its facts is that in the case we have under consideration the exemption claimed is of farm lands, whereas in the *Moody case* the exemption was of property lying within the limits of a city. This variation of fact does not in any sense alter the principle announced in the *Moody case.*

So apt is the language of the learned judge delivering the opinion in the *Moody case,* that we can do no better than quote it. In the *Moody case* Judge TRULY said: "The limit of value placed by law on the amount of land which can be held as exempt is solely for the protection and benefit of creditors, to prevent unreasonable amounts from being held exempt from execution, to the prejudice of those to whom just debts might be due. But the question of value has no place in the consideration of the rights of the surviving widow to the use and occupancy of the homestead. The purpose of the legislature was to protect the surviving widow, to whom, with others, the exempt property might descend, by securing to her during her widowhood the undisturbed use and occupancy thereof. A law designed to establish a beneficent public policy must be liberally construed in order to completely effectuate the legislative purpose. So we hold that the value of the homestead is not material in passing on the rights of the surviving widow under Code 1892, § 1553 (Code 1906, § 1658). She is entitled to continue to use and occupy the homestead. . . . So long as she remains a widow, her rights are absolute. She cannot be called

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on to account for the use and occupancy, nor forced to purchase the rights of her cotenants; nor is the property subject to partition in kind, nor to sale for the purpose of dividing the excess of the proceeds."

We need only state in this case that no creditor's rights are in any way involved. The contest is between the widow and the heirs. We have examined every case cited by counsel for appellant, and it is our view that none of them have any application to this case. Every case cited involved the rights of creditors, and, of course, in such cases the limitation of value is not to be disregarded. We may also add that, in full view of the construction placed on the statute in question, the legislature has re-enacted it without the change of a syllable, the same becoming Code 1906, § 1659. The object of setting aside the one hundred and sixty acres of land to the widow as exempt and free from partition was to secure to her a homestead and means of support. It was thought by the legislature that this was a sufficient quantity of land to do this. It was never in the legislative mind that this one hundred and sixty acres of land should be reduced in quantity, save in one instance, and that is where the rights of creditors were involved. In such case it was the purpose of the legislature to be just before being generous; hence the provision as to value. No higher claim under the law can be propounded than the right of the widow to claim her homestead rights. No statute ever passed has a greater claim upon the court for liberal construction than this. The statute undertakes to carry out that duty which the dead husband owed to his wife, and to compel by law the duty which affection should prompt the children to freely concede.

Affirmed.

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Statement of the case.

DAVID S. O'KELLY v. YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

[47 South. 660.]

1. RAILROADS. *Live stock killed on track. Stock laws. Animals wrongfully at large.*

In an action against a railroad company for killing a mule which escaped from a yard in the night without plaintiff's fault or knowledge, where the evidence, aided by the statute, made the company's liability a question for the jury, a stock ordinance in force in the city had no application to defendant's liability.

2. SAME. *Evidence. Inferences from physical facts.*

In actions against a railroad company for injuries to property, where the testimony of employes negatives the company's negligence, but the physical facts might justify an inference of negligence, the correctness of the employes' testimony and of the company's negligence are for the jury.

FROM the circuit court of Washington county.

HON. SYDNEY SMITH, Judge.

O'Kelly, appellant, was plaintiff in the court below; the railroad company, appellee, was defendant there. From a judgment in defendant's favor, predicated of a peremptory instruction, plaintiff appealed to the supreme court.

O'Kelly, appellant, sued the railroad company, appellee, for damages for the killing of a mule by a switch engine of the company.

The appellant made out his case, in substance, as follows: That the mule killed had been placed in an enclosed lot of an oil mill which plaintiff was patronizing; that during the night on which the mule was killed, without the fault or knowledge of the appellant, it escaped from the lot, went upon the track of the railroad company, where it was struck by a switch engine engaged in setting out some cars on a side track. The appellant's testimony tended to show that the mule had run down

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the track about five hundred seventy-five yards before being struck by a box car pushed by the engine; that the mule was unable to leave the track because of ditches on either side and piles of lumber on the right of way; that it was struck near a trestle. The engineer, in defendant's behalf, testified that he did not see the mule on the track; that the night was dark; that the machinery of his engine was in good working order; and that he was pushing two cars in front of the engine when he felt the impact. On this state of facts a peremptory instruction was given for defendant, on the ground that the mule was upon the company's track in violation of an ordinance of the city of Greenville, where the accident occurred, forbidding the running at large of such animals, which ordinance was introduced in evidence by the defendant.

The appellant assigned the granting of the peremptory instruction as error specifying the following reasons: (1) Because the fact that the stock law was in force did not preclude recovery; (2) because on the case made out by appellant he was entitled to the benefits of the provisions of Code 1906, § 1985; (3) because the evidence introduced by appellee was not sufficient to overthrow the presumption cast by said statute.

The code section is as follows:

"In all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of the locomotives or cars of such company shall be *prima facie* evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury. This section shall also apply to passengers and employes of railroad companies."

Hugh C. Watson, for appellant.

The court below erred in admitting the evidence relative to the stock law being in force in the city of Greenville and in the county of Washington.

Appellee failed to show that the animal was running at large

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Brief for appellee.

with the consent and knowledge of the plaintiff or by the fault of negligence of the plaintiff. *Roberds v. Mobile, etc., R. Co.*, 74 Miss. 334, 21 South. 10; 7 Am. & Eng. Ency. of Law, 373; *Smith v. St. Paul, etc., Co.* (Mich.), 82 N. W. 577; *Atlantic & W. P. R. Co. v Hudson* (Ga.), 58 S. E. 500; *Ensley Mercantile Co. v. Otwell* (Ala.), 38 South 839.

The court below erred in granting the peremptory instruction asked by defendant for the following reasons to wit:

1. Because the fact that the stock law was in force did not preclude recovery.

2. Because the evidence of the case did not warrant the granting of such an instruction. This is true for two reasons: (a) because the case made by appellant entitled him to the benefit of the provisions of Code 1906, § 1985, and (b) because the evidence introduced by appellee was not sufficient to overturn the presumption cast by the statute and exculpate appellee.

The case should have gone to the jury and the peremtory instruction asked by appellee refused. For aught the court knows from the evidence before it, the mule was struck and killed by some other train of defendant than the one on which witness for appellee was running. If there was any doubt as to what train struck the mule in question it was for the jury to draw its inferences. If the mule in question was struck by this particular train it was for the jury to find whether the engineer in charge of it exercised the proper care.

"Where different inferences might reasonably be drawn, the question of negligence is one for the jury, although the facts are undisputed." 8 Rose's Notes, 128, 129, and cases cited; *Williams v. Northern Pac. R. Co.* (Dak.), 14 N. W. 97; *Gulf, etc., R. Co. v. Ellis*, 54 Fed. 481; *Sioux City, etc., R. Co. v. Stout*, 84 U. S. 749.

Mayes & Longstreet, for appellee.

The circumstances of the killing having been shown, in the first place, the statute does not apply; and, in the second place,

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even if it did apply its requirement is met by the testimony of the engineer under the circumstances of the case.

WHITFIELD, C. J., delivered the opinion of the court.

The court erred in giving the peremptory instruction for the appellee. The plaintiff was entitled, under the facts of the case, to the application of Code 1906, § 1985. The stock law had nothing to do with the case. *Roberds v. Mobile, etc., R. Co.*, 74 Miss. 334, 21 South. 10.

The engineer was contradicted as to the character of night; other testimony being that it was a starlight night on which one could see some fifty to one hundred yards. The testimony of the plaintiff shows that the mule had run down the track some five hundred seventy-five yards on the roadbed of defendant before it was struck, and there was testimony that from the tracks of the mule and blood and hair of the mule on the ties and rails, it was inferable that the mule had been struck and killed by the train. The true doctrine to be applied to those cases in which the testimony of the engineer is to the effect that the appliances were all right and that he did all that he could, etc., the testimony for the plaintiff showing physical facts from which the jury might have believed that the testimony of the engineer was not correct, is established in the case of *Scott v. Yazoo, etc., R. Co.*, 72 Miss. 37, 16 South. 205. The case of *Louisville, etc., R. Co. v. Tate*, 70 Miss. 348, 12 South. 333, was invoked in that case for the railroad company but was distinguished by us, and we said in that case: "To approve the peremptory instruction in this case would be practically to hold that in cases of this character, in which the employes of railroad companies are often the only eyewitnesses, such witnesses cannot be contradicted by circumstantial evidence. It is the province of the jury, as the triors of fact, to ascertain the truth of a case clouded by such conflict in testimony." The wholesome rule in such cases, and the only safe rule, is not for the court to look to mere possible speculative theories, which, by strained construction, might harmonize the testimony of the employes with

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Syllabus.

the physical facts furnishing a legitimate deduction that such testimony is not correct, but to leave it to the jury to say from all the testimony, direct and circumstantial, whether the physical facts in the case show in accordance with the probabilities of the situation, and what would usually and ordinarily happen in such case, that the testimony of the employes is most likely incorrect. *Reversed and remanded.*

HENRY C. REED v. YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

[47 South. 670.]

1. RAILROADS. *Passengers. Suit for injury to. Contributory negligence. Evidence. Rule of company. Nonobservance. Instructions.*

In an action by a passenger against a railroad company for injuries caused by a collision while plaintiff was riding in the cupola of a caboose on a freight train, in violation of a rule of the company:—

(*a*) Evidence is admissible to show that the rule was unknown to the plaintiff and the public generally, and that it was not enforced, but that passengers were frequently allowed to so ride by conductors and trainmen; and

(*b*) A defendant's instruction to the effect that if plaintiff's occupancy of the cupola contributed "in any way whatsoever" to the injury he could not recover, although defendant was grossly negligent, was erroneous where it disregarded evidence tending to show that the injury was not due to plaintiff being in the cupola, and, aside from such evidence, because only contributory negligence proximately contributing to an injury will bar a recovery, and because plaintiff's contributory negligence will not excuse defendant's gross or wilful misconduct.

2. INSTRUCTIONS. *Duplicating.*

Where a requested instruction has already been substantially given its refusal is not error.

3. CROSS APPEAL. *Cross assignment of error. Must be seasonable.*

A cross appeal cannot be prosecuted nor cross assignment of error presented after the cause has been submitted on direct appeal.

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Statement of the case.

FROM the circuit court of, first district, Coahoma county.

HON. SAMUEL C. COOK, Judge.

Reed, the appellant, was plaintiff in the court below; the railroad company, appellee, was defendant there. From a judgment in defendant's favor plaintiff appealed to the supreme court.

Appellant took passage on a caboose of a freight train of the appellee, paying the regular fare required of him for transportation. Soon after boarding the caboose, he climbed up into the cupola, set apart for the use of the train crew, having a sign over the door leading into it prohibiting passengers from riding there. This sign appellant did not see, and, notwithstanding the sign, the cupola was generally used by passengers, and the rule of the company prohibiting its use was generally disregarded. Appellant testified that the conductor at no time entered the cupola, but passed through the caboose, saw appellant seated in the cupola, and made no objection. While appellant was seated in the cupola and the train was under way, the train separated, or broke into two sections. The front section approached a station, and stopped, when the rear section, which was moving at a rapid rate of speed, collided with it with such violence as to demolish many of the cars, and to derail the caboose in which appellant was riding, injuring not only appellant, but every other passenger and employe who was in the caboose at the time; some of the passengers riding in that part of the caboose set apart for passengers being injured as seriously as was appellant. Appellant had his leg broken, and suffered other injuries of a serious nature. He sued for damages; the railroad company pleaded the general issue, and gave notice thereunder that it would defend on the ground of contributory negligence on the part of appellant in entering the cupola contrary to the rules of the company. The case was submitted to a jury on instructions of the court and a verdict for defendant returned. Among other errors assigned by the appellant are the refusal by the court to grant the second instruction asked

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Opinion of the court.

by him, and the granting of the seventeenth instruction asked by the railroad company. The opinion treats in detail the other errors assigned. The two instructions referred to are as follows:

Plaintiff's instruction No. 2. Refused. "The court instructs the jury that the 'contributory negligence' of the injured party will not shield a railroad company from liability for an injury inflicted upon a passenger by reason of negligence of the railroad's servants where their negligence is marked by gross or willful or reckless misconduct."

Defendant's instruction No. 17. Given. "If the jury believe from the evidence that the injury complained of resulted partly from the act of the plaintiff in voluntarily taking a seat and riding in the cupola of defendant company's caboose attached to the train on which he was a passenger, and partly due to the gross negligence of the defendant company or its employes, they must return a verdict in favor of the defendant."

O. G. Johnston, for appellant.

Counsel cited the following authorities: *Ky. Cent. R. Co. v. Thomas,* 79 Ky. 167, 42 Am. Rep. 208; *Jacobus v. St. Paul, etc., R. Co.,* 20 Minn. 134, 18 Am. Rep. 360; *Dickinson v. Railroad Co.,* 53 Mich. 44, 18 N. W. 553; 5 Am. & Eng. Ency. of Law (2d ed.), 648; *Chicago, M. & St. P. R. Co. v. Lowell,* 151 U. S. 209, 14 Sup. Ct. 281, 38 L. Ed. 131; *Jones v. Chicago, etc., R. Co.,* 43 Minn. 279, 45 N. W. 444; *N. Y., L. E. & W. R. Co. v. Ball,* 53 N. J. Law, 286, 21 Atl. 1052; *Sweetland v. Lynn, etc., R. Co.,* 177 Mass. 574, 59 N. E. 443, 51 L. R. A. 783.

Mayes & Longstreet, for appellee.

[The reporter has been unable to find the brief of counsel for the appellee, hence no part of its contents is given.]

WHITFIELD, C. J., delivered the opinion of the court.

So far as the alleged cross appeal and cross assignment of

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errors are concerned, it is sufficient to say that, never having been filed until after the submission of this cause, they came too late for our consideration.

It is evident that there is fatal error in the record in several respects. We notice only those we deem essential. And first it was error not to permit the witness Thompson to testify that the rule as alleged was unknown to the public generally, and that as no such rule was ever enforced, as a matter of fact, the the public generally occupied the cupolas of these cabooses on freight trains at will with the full knowledge of trainmen and conductors of such trains (see *White v. Railroad,* 72 Miss. 12, 16 South. 248), and on this point the court refused instruction No. 9, asked by the appellant, which is as follows: "The court instructs the jury that the law recognizes the right of a railroad company to make and enforce reasonable rules, assigning to passengers the places in which passengers shall ride, but that a railroad company after making such a rule may waive or abandon it and treat passengers as if such a rule did not exist, and may lead them to believe that the rule is no longer in force, and, if a railroad company does this, it cannot set up the rule to defeat the rightful claims of passengers who have acted in the well-warranted belief that the rule is not in force." See, also, the authorities referred to in the very able brief of counsel for appellant in this action.

The fourteenth instruction given for the appellee is also fatally erroneous in telling the jury that "if the jury believe that at the time of the accident complained of the said plaintiff was so occupying a seat in said cupola of said caboose, and that his act in so occupying the said cupola contributed in any way whatsoever to the accident complained of by him, they should find for the defendant, notwithstanding they might believe that the defendant was guilty of gross negligence, and that but for such gross negligence the accident would not have occurred." This part of the instruction is erroneous for two reasons: In the first place, it is not true that any negligence of the plaintiff con-

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tributing "in any way whatsoever" to the accident would defeat a recovery. It is not any and all negligence which amounts to contributory negligence. It is such negligence only as contributes proximately to produce the injury that would bar a recovery. It is not negligence, however, remote in kind or degree which constitutes contributory negligence. It must be such negligence as proximately contributes to produce the injury. This part of the instruction is erroneous also because there was evidence in the case to show that the injury was not due to plaintiff being in the cupola. Two other persons, not sittting in the cupola, were injured, and one, a negro, seriously. The jury might have believed on the testimony that being in the cupola was not the cause of the injury and did not contribute as the proximate cause of the injury. The hypercriticism of this instruction, because of the misuse of the word "caboose" for "cupola," we do not, of course, notice. That was a mere clerical error. There is nothing in the instruction qualifying it so as to present to the jury the proposition that, being in the cupola, would not defeat recovery, unless so being there was the proximate cause of the injury.

Instruction No. 2, refused to the plaintiff, is a correct proposition, but seems to have been recovered by the instructions which were given.

The eighth instruction given for the appellee is also fatally erroneous. It is in the following words: "The court instructs the jury that although they may believe from a preponderance of the evidence that the defendant was guilty of gross negligence, which contributed in part to the accident complained of, yet, if they further believe from the evidence that the plaintiff was likewise guilty of any want of ordinary care or negligence which contributed in whole or in part to the accident complained of, a verdict in favor of the defendant must be returned." It amounted to telling the jury that, though they might believe from the evidence that the defendant was guilty of gross and willful negligence, yet if the plaintiff was guilty

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of only the least degree of negligence contributing in part to the injury, in however slight degree, contributing proximately or not, essential or nonessential, they should find for the defendant.

Instruction No. 10, for the appellee, is in the following words, and is manifestly erroneous for the same reason: "If the jury believe from the evidence that the plaintiff was guilty of any want of care, caution, and prudence, and that such want of care, caution, or prudence on his part concurred with the gross negligence of the defendant in causing the accident complained of, he cannot recover, and a verdict in favor of the defendant must be returned."

Neither the eighth instruction for the appellee nor the tenth contains a qualification that negligence on the part of the plaintiff which would bar recovery must contribute proximately in producing the injury. The case of *Brister v. Railroad Co.*, 84 Miss. 33, 36 South. 142, condemns both of these instructions.

The seventeenth instruction for the appellee is for the same reasons fatally erroneous. Indeed, this instruction assumed that riding in the cupola was dangerous, and that such riding in the cupola was the proximate cause of the injury, in the face of much testimony in the record to the contrary. We notice no other errors than those we have pointed out.

The judgment is reversed, and the case remanded.

Reversed.

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Statement of the case.

ELIZABETH ROBERTSON ET AL. v. JOHN G. ROBERTSON ET AL.

[47 South. 675.]

WILLS. *Joint testaments. Revocation. Trusts. Covenant to stand seized. Husband and wife. Clouds on title. Suits to remove.*

Where a husband and wife, by a writing stipulated to be operative both as a conveyance and as a will, agreed that on the death of either all of their property, owned at the date of the writing or thereafter acquired, should belong to the other for life, and, at the death of the survivor, should be divided, by commissioners to be appointed for that purpose, one-half to be allotted to their respective designated kindred:—

(*a*) Construing the instrument as a covenant to stand seized, the wife could not after the death of the husband, in the absence of fraud or mistake, maintain a suit to cancel it as a cloud on title and have the property, real or personal, vested in her; nor

(*b*) Construing the writing as a mutual or joint will, can she revoke it as to the interest disposed of by the deceased husband.

FROM the chancery court of Holmes county.

HON. JAMES F. MCCOOL, Chancellor.

Mrs. Robertson, and others, appellants, were complainants in the court below; John G. Robertson and others, appellees, were defendants there. From a decree in defendant's favor complainants appealed to the supreme court.

William A. Robertson and Elizabeth Pool were married in 1865. They lived together for many years, and acquired property, consisting principally of farm lands. In 1897, they, the husband then being eighty-one and his wife seventy-two years of age, and neither having a child or children, entered into the following written agreement:

"This agreement made this 27th day of October, 1897, between William A. Robertson and his wife, Elizabeth Robertson, of Holmes county, Mississippi, witnesseth: That we mutually agreed that during our lives any property that we now own or

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Statement of the case.

may hereafter acquire, shall, at the death of either, descend to the other for his or her life, that at the death of the survivor, all of said property shall be divided into two equal parts, half to descend and be inherited by the children of John G. Robertson, and the other half to descend and be inherited by the two nieces of Mrs. Elizabeth Robertson, Mrs. Laura Cullifer, and Mrs. Sarah Anderson, who reside at Halifaxton, Halifax county, North Carolina. If we do not divide the lands into two equal parts during our life time, then after the death of the survivor, Mr. John G. Robertson, or the guardian of his children, shall appoint one disinterested commissioner and Mrs. Cullifer and Mrs. Anderson shall appoint another disinterested commissioner and these two shall appoint a third and these three or a majority shall divide the land and personal property according to valuation and each set of heirs shall have the control and ownership of their half. If necessary for a fair and equal division, the commissioners may sell all or a part of the personal property and divide the proceeds, the report of the commissioners shall be entered of record and operate as a deed.

"It is mutually agreed that this instrument shall operate as a conveyance and as a will and that John G. Robertson is appointed as guardian of his children and executor of personal property subject to its division by commissioners as aforesaid.

"Witness our signatures the day and year aforesaid.

"W. A. ROBERTSON.

"ELIZABETH X. ROBERTSON.

"Attest:—J B. HOUSE, JAMES J. SHANKS.

"State of Mississippi, Holmes County. Personally appeared before me, the undersigned justice of the peace, W. A. Robertson and his wife, Elizabeth Robertson, who severally acknowledged that they signed and delivered the foregoing instrument on the day and year therein named and in the presence of the attesting witnesses who signed the attestation in their presence.

"Witness my official signature this November 1st, 1897.

"W. H. PIERCE, Justice of the Peace."

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Brief for appellants.

Soon after the execution of this agreement, which had been properly recorded, Mr. Robertson died. Mrs. Robertson continued in the use and occupancy of the property for several years, and John G. Robertson, a nephew of her husband, managed her affairs. Afterwards the two nieces of Mrs. Robertson died, and some of their children came from North Carolina to live with her, and shortly after their arrival this suit was filed by Mrs. Robertson and her nieces' children against John G. Robertson and his children to cancel the agreement entered into between Mr. and Mrs. Robertson. The bill alleged that Mrs. Robertson believed she was executing a will which could be revoked by her at pleasure, and that, being an illiterate woman, she was ignorant of the effect of the agreement. The object of the bill was to revoke the agreement and cancel the title of John G. Robertson's children to a one-halif interest in the property so that the entire estate would, by operation of law, become vested in Mrs. Robertson, the widow of William A. Robertson, deceased.

Tackett & Elmore, for appellants.

The instrument under discussion is a will. In construing an instrument of equivocal character, the purpose is to give the instrument that construction intended by the maker, as shown by the instrument itself and the circumstances surrounding its execution. Adopting this rule, in interpreting the instrument before us, an examination of the circusmtances surrounding its execution shows that the parties who executed the instrument intended it as a will.

In the old case of *Green v. Proud,* 1 Mod. 117, 3 Keb. 310, the paper had striking characteristics of a deed; but the court said: "Here being directions to make a will and the person sent for with that end in purpose, this is a good will." Speaking of this case, Jarman (1 Bigelow's Ed.), 19, says: "The court seems to have been influenced by the circumstances that the person who prepared it was instructed to make a will."

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Brief for appellants.

Searching the instrument itself, for the intention of the parties, there is one feature which might be thought to operate against our contention; and that is, that the instrument was acknowledged and put upon record. But under the circumstances, that feature loses its force, for the reason that it appears that Mr. Robertson evidently believed that a will should be recorded.

In *Cunningham v. Davis,* 62 Miss. 266, Chief Justice Campbell held an instrument in the form of a deed, which was acknowledged before a justice of the peace and characterized in the writing itself as a "deed of conveyance" to be a will, showing that the acknowledgment amounts to nothing as against the testamentary intention. It would be especially so in this case, where the parties undoubtedly believed that a will should be placed on record.

The instrument itself says: "It shall operate as a conveyance and as a will." The designation of the instrument as a conveyance is not controlling, as shown by *Cunningham v. Davis,* above referred to. An ordinary will may be called a conveyance. In *Meek v. Thornton,* 36 Miss. 190, a will is referred to as "a form of conveyance." In *Gould v. Mansfield* (Mass.), 4 Am. Rep. 573, the court uses this language: "If we look at the character of the act to be done, we find that a will is considered in the nature of a conveyance by way of appointment." On account of the conflicting characteristics of a deed and a will, one instrument embracing both forms of conveyance, is certainly a novelty. There may be cases where the instrument operates as a deed and as a will. In such cases, however, that part of the instrument operating as a will, and that part operating as a deed, should at least be sufficiently distinct and separate, so that they could be distinguished with some degree of certainty.

It will also be noticed that there are no operative words conveying any present interest. The operative words, without a single exception, are all in the future tense.

If this instrument be construed to be a deed, it unquestion-

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ably by the strength of its very terms, purports to convey the entire property owned by the makers at the time of its execution. Not only that, but it conveys all the property to be acquired by them in the future. The exact words of the instrument on this point are: "We mutually agreed that during our lives any property that we now own or may hereafter acquire shall," etc.

In *Sartor v. Sartor,* 39 Miss. 761, the instrument contained the following words: "For the love and affection that I have for my wife, Harriett N. Sartor, I give unto her all my property, real and personal, during her widowhood."

The court will observe that the clause there passed upon does not go so far as to include after-acquired property as does the instrument in this case. In construing that instrument, the court at page 772, referring to the clause above quoted, says: "But the terms of the instrument render it extremely uncertain whether the maker did not design to vest the property immediately in Mrs. Sartor, but to postpone the enjoyment until after his death. This is unquestionably the natural import of the language used . . . If, however, we adopt this construction, and in consequence determine the writing to be a deed and not a will, the effect of the instrument, if valid for that purpose, is to strip the grantor of his entire estate, real and personal. And for that reason, if for no other purpose, it is highly improbable that the maker intended the instrument to have that effect.

In *Crooker v. Smith* (Ala.), 10 South, 258, the court in construing a doubtful instrument executed by a husband in favor of his wife says: "By reference to the judgment, it will be observed that the right or interest which it purports to pass, is not only of all the property, real and personal, which the maker then owned, but also of all that he might thereafter own . . . The inclusion of after acquired property seems to indicate the intention that the instrument should not pass any present right or interest."

In *Crooker v. Smith,* a lifetime estate was specifically re-

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served to the grantor and the instrument recited the consideration of one dollar and the natural love and affection, and the operative words were "I hereby give, convey and confirm."

This writing under consideration says: "If we do not divide the lands into two equal parts during our lifetime" commissioners shall divide the land and personal property. The above quoted clause conflicts with the position that this instrument passed any present interest. If a remainder vested at the time, it vested under conditions expressed in the instrument alone, since the instrument must be construed most strongly against the grantors. There is no reservation to them of a right to divide the property and if a remainder vested, the makers would have had no right as against the remaindermen to divide the property into what the makers might consider two equal parts.

The fact that there was no description of the land numbers is also some indication that the parties did not intend the instrument to have the effect of a deed. Deeds usually describe land by land numbers; wills, as a general rule, do not.

The appointment of an executor is strong in its indication of what the parties intended this instrument to be. An executor is one to whom the carrying out of the directions of a will is confided. We have never heard of such a thing as an executor of a deed. A lawyer gave this instrument its legal form, and would a lawyer have appointed an executor of a deed? Or would a lawyer have attempted to appoint an executor by a deed?.

The appointment of a guardian is equally strong as an indication that the instrument was intended as a will.

We further contend that the instrument would be ineffectual to convey any after acquired land, since there is no covenant of warranty contained in it.

As a will this instrument is not binding upon Elizabeth Robertson.

The general rule as to revocation of joint or mutual wills is

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announced as follows: "A mutual will is revocable by the testator at any time prior to his death. And this is so, though he survives the other testator, provided he takes no advantage under the other will.

While no legal obligation not to revoke is created by the mere execution of mutual wills, yet, if the wills are executed pursuant to a contract and either testator revokes without notice, the other may compel the specif l performance of the contract, or may recover damages for a breach of a contract." 30 Am. & Eng. Ency. Law, 621.

A. M. Pepper, for appellees.

Assuming for the sake of argument that the instrument in controversy has the requisites of a valid will, the same was not revoked by Mr. Robinson during his lifetime and consequently, as to the one-half interest of Mr. Robertson in the property given to these appellees (defendants below), the future action of Mrs. Robertson and her grantees (appellants here and complainants below), as to her one-half interest in same should in no wise affect appellees; provided Mrs. Robertson so uses her life estate therein in such a manner that appellees' vested remainder interest shall not be destroyed or defeated.

As a matter of fact the writing is good as an agreement, as a contract and compact, deed of conveyance, and as a will, and may be so construed together, as laid down by Professor Bourland in his recent work on the "Law of Wills and Testament," in which he says on page 18, "A will, lease, and deed made at the same time may be construed together," this rule is also laid down in *Jack v. Hooker,* 71 Kan. 652, and a number of other cases there cited.

FLETCHER, J., delivered the opinion of the court.

The testimony of Mrs. Elizabeth Robertson having been properly suppressed, no satisfactory evidence remains upon which we can say safely that the property in controversy was the

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sole property of appellant Mrs. Robertson. Nor can we hold that the agreement made between the parties should be avoided on account of mistake, undue influence, or fraud. We think the chancellor was correct in holding that the agreement was fairly entered into and represented the wishes of the parties at the time. It only remains, therefore, to determine whether, giving the agreement its full legal effect, the bill can be maintained. This agreement will be set out in full by the reporter. The bill seeks to cancel this instrument as a cloud upon the title of complainants, and was manifestly framed upon the theory that the writing conveyed some present vested estate or interest to the appellees, but that on account of the fraud in its execution it should be now set aside and held for naught. It is now sought to have the instrument declared a will, and therefore revocable at the pleasure of appellant Mrs. Robertson. If the instrument be construed as a compact, or, perhaps more accurately, a covenant to stand seised to the use of the grantees named, which construction seems to us the correct one, then clearly the suit must fail. On the other hand, if the instrument should be held to be a mutual or even a joint will, it is clear that the surviving testator cannot revoke the will as to the estate belonging to the deceased, which became vested at the death of the testator. *In re Cawley's Appeal,* 136 Pa. 628, 20 Atl. 567, 10 L. R. A. 93.

In any view of the matter, the decree must be affirmed.

Affirmed.

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Statement of the case.

CITY OF BILOXI v. BILOXI REAL ESTATE COMPANY ET AL.

[47 South. 729.]

MUNICIPALITIES. *Taxation. Assessments. Changes in values. Code* 1906, § 3422.

Under Code 1906, § 3422, authorizing municipal authorities, at a regular or special meeting held in September or October of each year, to increase or diminish the value of property as assessed for municipal taxation, changes of assessment values made by a municipality after the end of October are void, although made at a meeting held pursuant to an adjournment in October.

FROM the chancery court of Harrison county.

HON. THADDEUS A. WOOD, Chancellor.

The Biloxi Real Estate Company and others, appellees, were complainants in the court below; the city of Biloxi, appellant, was defendant there. From a decree in complainants' favor, overruling a motion to dissolve a preliminary injunction, the defendant appealed to the supreme court.

By their suit the complainants, appellees, sought and obtained an injunction restraining the city of Biloxi from collecting a tax levied by the municipal authorities upon property within the city limits. The bill charged that the tax was illegal because the mayor and board of aldermen met on October 31, 1908, for the purpose of raising and lowering the values of the taxable property in the city, and continued their sessions during the month of November, and made changes during said month largely increasing the assessed value of the property of each of the complainants.

Code 1906, § 3422, is as follows: "The mayor and board of aldermen of a city, town, or village may, at a regular or special meeting, to be held in September or October in each year, increase or diminish the valuation of property as assessed for taxation. Ten days' notice of the meeting at which such changes

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Brief for appellant.

are to be made shall be given by posting written notices thereof in five or more public places in the municipality, and in cities the notice shall also be published in a newspaper, if there be one published therein. Any person aggrieved by the action of the mayor and board of aldermen may appeal therefrom to the circuit court as in other cases of appeal, and the same shall be tried *de novo* in the circuit court."

Doty & Elmer, for appellant.

There are no allegations in the bill of complaint sufficiently made to warrant a court of equity in granting relief, much less permit an injunction to stand. Allegations of irreparable injury are not sufficient, but the facts and conditions which exist and by reason of which irreparable injury will occur must be definitely given. *McFarland v. Town of Jennings,* 106 La. 541.

The bill of complaint does not allege that any attempt was made by any of the complainants therein to have the assessment roll changed; either increased or decreased; nor does it state whether any of the property was improved by buildings or drainage or otherwise, since the last assessment roll was made.

The next question raised is, had the mayor and board of aldermen the right, after having given the notices, as required by law, to increase or diminish the assessment? Having begun in the month of October, and the taxpayers having had due and legal notice, the board had a right to continue until the entire roll was gone over. This was merely an equalization of taxes, in order to fix the levy. 1 Abbott's Municipal Corporations, sec. 324.

The appellees, complainants below, did not make out even a *prima facie* case. Cooley on Taxation, 750. For a merely irregular assessment, the statutory remedy is the exclusive remedy; it is supposed to be adequate for all the requirements of justice; and it is the party's own folly if he fails to avail himself of it.

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Brief for appellees.

In this bill there is no fraud charged directly, nor are there any allegations that would imply fraud; hence a resort to a court of equity cannot be had.

Equity will not relieve against an assessment of property for the purpose of taxation, on the grounds that such an assessment is too high, when the excess, if any exists, results from an honest error of judgment on the part of the one making it. In such cases, the party aggrieved must resort to the remedy provided by statute. If he omits to do so at the proper time and place, the remedy is lost. *Butternuth v. St. Louis Bridge Co.*, 5 Ill. 545, 5 Am. St. Rep. 545.

As there are no allegations in the of complaint that the property of the complainants, appellees here, was assessed proportionately at a higher rate than other property in the same locality, and none that the complainants, appellees here, are paying a greater rate of taxation than any other citizen of Biloxi or taxpayer who owns property in the same locality on the property described in the bill of complaint, no relief can be granted in a court of equity.

Nowhere in the bill is there any offer to do equity by those who have sought, through a court of chancery, to clog the wheels of a municipality and embarrass its officers.

Dodds & Leathers, for appellees.

The action of the board in arbitrarily increasing the assessment of appellee's property according to geographical location and districts as alleged in the bill of complaint is utterly null and void, and consequently appellees are not liable for taxes on said increased assessment. *Hawkins v. Mangum,* 78 Miss. 97, 24 South. 872. Code 1906, § 3422, provides how and when boards of mayor and aldermen shall equalize the assessment of property. The appellant board did not meet to equalize the assessment of complainant's property until the night of October 31, 1908, although said section provides that it shall be done in September or October. Statutes providing for assessment and

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taxation of property are to be strictly construed, and appellant did not make even a substantial compliance with the section. *Adams v. Greenville,* 77 Miss 881. Appellant increased the assessment of all of appellee's property in the present case, and increased the assessment *in solido,* without authority to do so. *Tax Collector v. Ingersol,* 62 Miss. 73.

Appellant seems to depend largely on the case of *Ames v. Noxubee County* (Miss), 3 South. 37 In that case there was no question raised as to the validity of the action of the board in increasing the assessment, it was not alleged that its action was void, the only purpose of the bill having been to seek a reduction of the assessment. In the above case the court uses the following significant language in the opinion: "Resort to chancery should not be allowed, in the absence of special circumstances making such resort proper."

MAYES, J., delivered the opinion of the court.

If the injunction in this case is maintainable, it must be on the sole ground that the mayor and board of aldermen had no power, under section 3422 of the Code of 1906, to increase or diminish the valuation of any property assessed for taxation after October, the time limit fixed by the legislature for such action. We have examined, very carefully, all the other contentions of counsel for appellees on the questions urged, and it is our judgment that there is no merit in any of them, since the facts alleged, if true, as to all other matters not indicated above, are mere irregularities, and not subject to impeachment by any collateral proceeding.

If section 3422 of the Code of 1896 limited the mayor and board of aldermen in the time within which they should meet for the purpose of increasing or diminishing the valuation of property assessed for taxation to a regular or special meeting to be held in September or October and no other time, then any meeting held for this purpose, even though it be an adjourned meeting beginning on the 31st day of October, which extended

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the sitting time fixed by the statute for this purpose, is utterly void as to anything done by them after that date. In order to determine this, we cannot look alone to the chapter on municipalities, but must also consider the general revenue laws of the state. Indeed, by section 3423 of the Code of 1906 it is required that the tax collector of the municipaltiy shall collect municipal taxes during the time, and in the same manner, and under the same penalties as the state and county taxes are collected, and shall in all particulars, in so far as not otherwise provided, be governed by the general revenue laws of the state. The whole scheme of the revenue laws clearly contemplates that the tax roll shall be made up and ready for collection about November of each year, and the process of preparation is not to be indefinitely protracted. By section 4291 of the Code of 1906 it is made the duty of the assessor to complete and deliver the rolls to the clerk of the board of supervisors on or before the first Monday in July in each year. By section 4294 it is made the duty of the board of supervisors at its July meeting to examine and determine whether or not the assessment is to be approved. By section 4314 of the Code of 1906 it is made the duty of every person assessed to pay his taxes on or before the 15th day of December.

We merely cite these sections of the Code for the purpose of showing that it was plainly the purpose of the legislature to limit the time in which there shall be a preparation of the rolls for the purpose of taxation, since it is necessary, before the time arrives for the payment of taxes, that all rolls should be complete and in the hands of the tax collector. In the case of *Tierney v. Brown,* 67 Miss. 109, 6 South. 737, where the board of supervisors approved an assessment roll three days after the time limit allowed by law under section 1353 of the Revised Code of 1871, which only allowed the supervisors to remain in session four days, and no longer, it was held that such action was void and could not support a tax sale of lands made under it. In the case of *New Jersey Zinc Company v. Sussex*

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Dissenting opinion.

County Board of Equalization, 70 N. J. Law, 186, 56 Atl. 138, it was held that, where the board of equalization was limited in the time for the completion of its work to the last day of September, the board could not act upon assessments on October 1st, and that, if it did, such an action was a nullity. To the same effect are the cases of *Auditor General v. Sessions,* 100 Mich. 343, 58 N. W. 1014; *Auditor General v. Chandler,* 108 Mich. 569, 66 N. W. 482; *Wiley v. Flournoy et al.,* 30 Ark. 609; *Sioux City & Pac. Ry. Co. v. Washinton County,* 3 Neb. 30; *State v. Cent. Pac. Ry. Co.,* 21 Nev. 270, 30 Pac. 693. In the case of *Matador Land & Cattle Co. v. Custer County,* 28 Mont. 286, 72 Pac. 662, it is held that, the life of a board of equalization being fixed by the legislature, they can hold for no longer time than that prescribed.

The legislature of the state never contemplated that the mayor and board of aldermen would undertake to extend the time allowed them by the law for increasing or diminishing valuations by undertaking to fix their first meeting on the last day in the month, and then protract the session beyond the time by adjourned meetings. That cannot be done without defeat of the legislative purpose. We only decide in this case that the action of the mayor and board of aldermen, under section 3422, after October, was a nullity; but we do not hold that the assessment as returned by the special assessor appointed for this purpose was not valid in so far as this proceeding is concerned, and furnishes a true roll as a basis for the collection of taxes.

The decree appealed from is *affirmed* and cause *remanded.*

Affirmed.

FLETCHER, J., delivered the following dissenting opinion:

I am driven to dissent. I cannot bring myself to agree that section 3433 is so peremptory in its meaning that the additions and corrections to an assessment roll made at a meeting begun in October but extending beyond that month are absolutely

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void. No case has been called to my attention which so holds either directly or by fair inference. The cases cited in the majority opinion deal with statutes which in effect prohibit the continuance of the session beyond a named date. But the statute here requires no more than that the meeting shall be held in September or October. The meeting was in fact held in October, but it being impossible to complete the business at the initial session, the sitting was protracted into the month of November. This at most was in my judgment no more than an irregularity of which advantage must be taken, if at all by appeal. Hereafter municipal boards must see to it that in spite of unavoidable accident, impossible to foresee, their meetings must be concluded before the first of November. I can find no warrant in the statute for such a rigid holding.

HARRIETT K. LADD v. WILLIAM S. CRAIG ET AL.

[47 South. 777.]

1. JUDICIAL SALES. *Administrators. Decree for sale of land. Recitals. Service of process. Evidence. Absence of court files.*

In the absence of the court files, a decree authorizing an administrator to sell the lands of his intestate for the payment of debts, reciting that the defendants were duly served with process before its rendition, should not be overthrown by denials that they were so served where the testimony is not clear, overwhelming and convincing.

2. SAME. *Same. Collateral attack. Inadequacy of price.*

On a collateral attack an administrator's sale of lands will not be held void for inadequacy of price, where the sale was made in unsettled and troubled times and the land was subject to a life estate which postponed the purchaser's occupancy for many years.

3. SAME. *Same. Confirmation. Evidence. Payment of bid. Sufficient proof.*

A decree confirming an administrator's sale of land, adjudging that it was made in conformity with the decree of sale, together with

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Brief for appellant.

a recital in the deed to the purchaser that the purchase money had been paid and a charge therewith against the administrator in his accounts, sufficiently prove the payment, in a collateral attack on the sale predicated of its alleged nonpayment.

4. SAME. *Same. Place of sale. Code* 1871, § 1038. *County seat. Confirmation. Effect.*

By confirmation the court makes an administrator's sale its own; Code 1871, § 1038, providing that where no direction is given as to the place of sale, an administrator's sale, it shall be made at the county seat, does not apply to a decree empowering an administrator to make sale at a place to be determined by him, since the decree gave direction as to the place; and a sale made thereunder, confirmed by the court, is not subject to objection because not made at the county seat.

5. COUNTY SEAT. *Evidence. Judicial notice.*

Courts take judicial notice of the present location of the county seat of a county and where it has been located in the past.

FROM the chancery court of, first district, Yalobusha county.

HON. ISAAC T. BLOUNT, Chancellor.

Craig and others, appellees, were complainants in the court below. Mrs. Ladd, appellant, was defendant there. From a decree in complainants' favor defendant appealed to the supreme court.

The facts are stated in the opinion of the court.

William C. McLean, for appellant.

It was not the duty of the administrators to preserve court papers; it was the duty of the clerk to do so, and the fact that the papers are missing is no evidence of negligence upon the part of the administrators, or the purchaser of the lands. Neither the purchaser of the lands, nor the administrators are to be prejudiced in the least by the fact that the papers are missing from the record, and our court has repeatedly held that the fact that papers are missing from the record is not to be considered, so as to at all prejudice the rights of the parties who claim by virtue of the proceedings. Surely a purchaser of lands at an administrator's sale is under no duty or obligation whatever to see that the court papers are preserved.

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Brief for appellant.

The deed from the administrators to Black shows that the total amount bid for the land was the sum of $924; one third of this sum is $308, and the deed acknowledged the payment of this sum; and the deed also recites that the purchaser gave his two bonds, each for the sum of $308, and the final account of the administrators, which they presented and which was passed on and approved and accepted by the court as a true and correct final settlement, charged the administrator with, first, the $308, the cash payment; and secondly, with the $618, the deferred payments.

The record conclusively shows that Black became the purchaser of this land, and that he paid every cent of the purchase money to the administrators. There is nothing at all in the record even suggesting or intimating that there was any fraud or unfair dealings, either upon the part of the administrators or upon the part of Black, the purchaser of this land at the administrators' sale. There is no evidence in the record what was the value of the property sold. We must bear in mind the interest which the purchaser obtained was simply a reversionary interest, was purely speculative, and the facts in the case disclose that the widow lived over thirty-three years after this sale and during all of this time, the purchaser was kept out of the enjoyment of the interest he purchased. This case is a fit illustration of the uncertainty as to the value of a reversionary interest in real estate.

The decree ordering the sale of lands does not name where the lands shall be sold, except that it be sold in the county in which they are situated—the decree reciting: "Said administrators shall at the time and places appointed, being within the counties where the lands are situated, sell at public vendue to the highest bidder," etc. Under the law as it then existed, and as it had then existed in this state, at least since 1857, the chancery court was empowered to name a place other than the courthouse, where the land could be sold. Code 1871, § 1038.

The court had the right in the first instance to direct the sale of these lands at Oakland, and it necessarily follows that the

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Brief for appellee.

court had the right to approve the sale that was made at Oakland. This is not really open to debate, but all of the authorities are *uno flatu* concur in saying that confirming the sale, cured all defects in selling at the wrong place. *Henderson v. Herrod,* 23 Miss. 434; *Tate v. Bush,* 62 Miss. 145, 17 Am. & Eng. Ency. of Law (2d ed.), 993 and notes, and extended notes to 29 Am. St. Rep. 495.

While the court below did not decide the question, yet, it was sought in the court below to nullify the decree ordering the sale of the lands, by showing that the parties were not served with process. The rule is well settled in this state and elsewhere (see *Cox v. Simmons,* 57 Miss. 183; *Summers v. Sivley,* 57 Miss. 712; *Duncan v. Gerdine,* 59 Miss. 550) that the evidence must be clear, direct, positive, affirmative and absolutely convincing that the parties were not served with process. The courts will never disturb a judgment or a decree of a court of record upon the ground that the parties were not served with process, except where the evidence is clear and convincing—in fact, if there is any doubt at all, the doubt will be resolved in favor of sustaining the decree.

The final decree, rendered November, 1872, specifically recites that the parties, naming them, had been served with process.

The action is barred under the two years' statute. Code 1892, § 2751; Code 1880, § 2631; Code 1871, § 2160. This suit is a suit in the nature of a bill of review, and consequently must be brought within two years after the removal of the disabilities of minority.

W. V. Sullivan, for appellees.

The widow of deceased being in possession until July, 1906, the statute of limitations did not run until that time. There never has been and the record does not show service of process to declare the estate insolvent and sell it. Affirmative proof shows that those who were interested in the attempt to declare the es-

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tate insolvent wished to steal this property. It does not appear that Black ever paid one cent for the land in question. He neither paid anything nor did anything that should tend to confirm the title.

Mrs. Black, now Mrs. Ladd, the party in interest, is living and according to her showing never owned any interest in the land. No process was ever served upon any one of the children in this case.

FLETCHER, J., delivered the opinion of the court.

Appellees, who are children of William B. Craig, deceased, bring their suit for an injunction against appellant to restrain her from prosecuting an action of ejectment against tenants of appellees in possession of certain lands situated in Yalobusha county.

Both parties to the controversy deraign title from William B. Craig, who owned the land at the time of his death, in 1869. In November, 1871, Moore and Green were appointed administrators of the estate, and some time thereafter exhibited their bill in the chancery court, making all the heirs, some of whom were minors, parties defendant, asking that the estate be declared insolvent and the lands sold to pay debts. On November 7, 1872, a decree was entered sustaining the prayer of the bill, declaring the estate insolvent, and directing the sale of the lands. This decree recited that "summons has been issued to and duly and legally served on the heirs at law and distributees of said estate;" and all these heirs are named in the decree. Prior to the rendition of this decree, a guardian *ad litem* had been appointed for the minor defendants, and an order made directing the issuance of process.

The decree of November 7, 1872, provided: "It is further ordered, adjudged, and decreed by the court that after first giving four weeks' notice of the time, places, and terms of sale by advertisements put up in three places in the counties where the lands of said estate are situated, and also by publishing such

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notice of sale once a week for four consecutive weeks in some newspaper published in such counties (or if none be there published, then in a newspaper published in the most convenient county to that in which the lands to be sold are situated). Said administrators shall at the times and places appointed, being within the counties where the lands are situated, sell at public vendue to the highest bidder at public outcry the lands designated and described in their said petition, and in addition thereto any and all other lands, tenements, and hereditaments belonging to the estate of their said intestate, William B. Craig, deceased, together with the reversion in fee of said estate in the lands allotted and set apart to the said Mary Jane Craig as dower. And that they do require the purchasers of said lands at said sales to pay one third of the purchase money in cash, one third in one year, and one third in two years from the day and date of sale, taking from said purchasers for the two deferred and credit payments bonds and securities, and, in addition to the bonds so taken from each purchaser for said credit payments, holding the lands liable and subject to a lien therefor."

On February 8, 1875, a decree was entered by the chancery court confirming a sale of the lands by the administrators made pursuant to the decree of February 7, 1872, and in this decree it is recited that it appeared to the satisfaction of the court that "said sale was made, conducted, and concluded strictly in accordance with law, and that the directions prescribed in the decree of sale by this court have been followed," etc.

It should be stated that, contemporaneously with these proceedings, the surviving widow of William B. Craig had applied to the court to have her dower interest allotted, and such regular and usual proceedings were had that the lands now in controversy were so allotted to Mrs. Craig, and she resided on this land continuously until her death in July, 1906. It will be remembered that the decree of November 7, 1872, provided for the sale of the reversionary interest in the land allotted as

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dower to the surviving widow, and that the administrator's sale was confirmed as aforesaid, in February, 1875. One A. J. Black purchased the reversionary interest, and to this interest Mrs. Ladd, the appellant here, succeeded. It will thus be seen that the attack is upon the sale made to Black by the administrators, Moore and Green. If this sale is void, the land belongs to the heirs of William B. Craig; if the sale is to be upheld, Mrs. Ladd is the lawful owner of the reversionary estate, the life estate having terminated at the death of the life tenant, Mrs. Craig.

The petition asking for the sale of the lands, the summons to the heirs to appear and contest the petition, and the report of the commissioners who made the sale, are all missing from the files, and their absence from the record is satisfactorily accounted for. There remain, however, the order directing process to issue, the decree ordering the sale and giving directions for its conduct, the decree confirming the sale, the final report of the administrators, showing payment of the purchase money, and the deed which the administrators made to Black.

It was sought to impeach the validity of these proceedings by presenting parol proof that the defendants had never been served with process to answer the original petition. Whether this proof was competent and sufficient to overthrow the recitals in the decree, to the effect that all the interested parties had been regularly summoned, the chancellor thought it unnecessary to decide. For our part, we cannot hold that this parol testimony is sufficiently clear and convincing to contradict the decree. No good purpose will be subserved by pointing out in detail wherein lies the inherent weakness of this proof. We content ourselves with saying that, under all the authorities, the proof necessary to overthrow a decree must be clear, overwhelming, and convincing, and this proof falls far short of this strict and established standard.

It was thought by the chancellor that the consideration paid by Black was so grossly inadequate as to throw suspicion upon

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the sale. But it must be remembered that this sale was made in that unsettled and troubled period in our history when land values were greatly reduced, a result attendant upon the political condition of our state. Then, too, the purchaser at this sale was buying subject to a life estate, which, in fact, postponed for nearly thirty-five years his occupancy of the premises. Considering the character of the times and the nature of the estate purchased, we cannot attach significance to the alleged inadequacy of the purchase price. Nor can we agree with the chancellor that there is no evidence in this record that the purchase price was paid. The decree confirming the sale recites that all the conditions imposed by the decree ordering the sale had been complied with, among which was the payment of one-third of the purchase money in cash and the execution of bond for the balance. Furthermore, if we look to the recitals of the deed made by the administrators to Black, we see that the purchase price of the lands bought by Black at the sale amounted to $924, and in the final account of the administrators they charge themselves with this identical sum as having been received from Black. We find no difficulty, therefore, in reaching the conclusion that the sale was made in good faith, after due notice to the parties, and that the purchase money was actually paid.

One other question remains to be considered. All the proceedings in this case were governed by the Revised Code of 1871, § 1038, which provided that sales of real estate, ordered by a decree of a court of chancery, shall be made "at such place and on such notice as may be directed in the decree, and if no direction shall be given, then at such place and on such notice as is required in case of sales under execution at law." Sales of real estate under execution were required to be made at the county seat. Now, while the decree confirming the sale is silent as to the place where the sale was made, there being only a general recital that all the provisions of law and all the directions of the former decree had been complied with,

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yet the deed executed to Black recited that the sale was made at Oakland, which we judicially know is not now, and has never been, the county seat of Yalobusha county. It may well be doubted whether this recital in the deed is of sufficient evidential value to overthrow the presumption that attends the correctness of the court's decree, adjudging that the sale was made in conformity with law. As was said in *Tate v. Bush*, 62 Miss. 145, in a case where counsel for appellee conceded that the sale was made on the premises and not at the county seat: "If it be admitted that a legal sale could not have been made except at the door of the courthouse, it yet remains true (in the absence of any statement in the report that the sale was made at any other place) that the time, manner, and place of sale were necessarily involved in the hearing of the application to confirm, and the presumption must be indulged, even on direct appeal, that the decree was found upon sufficient evidence."

However this may be, and conceding that there is competent and sufficient proof of which to predicate the conclusion that the sale was made elsewhere than at tthe county seat, we do not think this fact, in the light of the language quoted from the decree in the early part of this opinion, renders the sale void. It should be noticed that the statutes gives to the court ample power to name, in the first instance, a place other than the county seat where the sale should be had. The sale was not, therefore, held at a place prohibited by law, but at a perfectly proper place, provided the court had so designated. It may be said that the decree in this case failed to designate a place, and that therefore no legal sale could have been made except at the county seat. The error in this argument is readily seen by an inspection of the language of the decree, which we shall attempt to demonstrate a little later. Here we desire to say, that, even if no directions had been given, there is respectable authority for upholding the decree. The Kentucky court of appeals puts it thus: "The judgment failing to designate the place where the sale should be made, the law required

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the commissioner to make it at the door of the courthouse of the county in which the property was situated. But the sale having been made and reported, the court had jurisdiction to decide whether it had been made according to the law, and confirmation of the report was a decision that the sale had been so made; and, however, erroneous that decision may have been, the judgment of confirmation was not void." *Revill's Heirs v. Claxon's Heirs,* 12 Bush, 558. Mr. Freeman reaches the same conclusion from a viewpoint slightly different from that assumed by the Kentucky court, when he says: "The object of the proceeding for confirmation is to furnish an opportunity for inquiry respecting the acts which have been done under the license to sell. The court may, if it deems best, ratify various irregularities in the proceedings. If the officer changed the terms of the sale, the court may ratify his action provided the terms, as charged, are such as the court had power to impose in the first instance." Freeman on Void Judicial Sales, § 44.

But there is a consideration akin to the ones just treated, but not identical with them, arising from the precise language of the statute and the precise language of the decree ordering the sale. The statute, let it be observed, provides for a sale at the county seat only in the event that no directions as to the place of sale are given. The decree in this case, fairly considered, authorizes the administrators to name a place for the sale, and to give notice in the advertisement of the time and fact of sale at the place so selected by them. It cannot, therefore, be said that no directions whatever were given as to the place of sale. That function which might well have been performed by the court was committed to the administrators; in this case, officers and agencies of the court, moving only under the court's direction. Their act in selecting Oakland as the place of sale became the act of the court when their report came in for scrutiny and approval by the court. The report being in all things confirmed, any irregularity in the sale on account of the place where it was made was cured by the action of the court in adopt-

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ing the selection which the administrators had made, and which thereby became as effectual to pass title as if selected by the court in the first instance. As is well said by the supreme court of Virginia: "Confirmation is the judicial sanction of the court; and by confirmation the court makes it a sale of its own; and the purchaser is entitled to the full benefit of his contract, which is no longer executory but executed, and which will be enforced against him and for him." *Langyher v. Patterson et al.*, 77 Va. 470.

It follows from these views that the court below was in error in sustaining the bill of appellees and in dismissing the cross-bill of appellant, and the cause must be remanded for further proceedings in accordance with this opinion.

Reversed and remanded.

ALBERT C. BRETT v. STATE OF MISSISSIPPI.

[47 South. 781.]

1. CRIMINAL LAW AND PROCEDURE. *Murder. Evidence. Photographs.*

In a murder case, pictures, not representations of the scene of the homicide, but created by the joint efforts of the state's leading witness, whose testimony is controverted, and a photographic artist, are not admissible in evidence.

2. SAME. *Instruction. Maliciously. Malice aforethought.*

The word "maliciously," used in an instruction in a murder case, does not convey the same meaning or have the same force and effect as the words "malice aforethought."

3. SAME. *Same. On weight of evidence.*

An instruction in a murder case is not on the weight of evidence where it simply charges that the defendant is guilty of murder if the jury believe from the evidence, beyond a reasonable doubt, that he wilfully and maliciously shot and killed the deceased with a deadly weapon, at a time when defendant was not in imminent danger and when he had no reasonable ground to apprehend such danger.

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4. SAME. *Charges already given.*

Where every phase of defendant's case is fully covered by instructions already given at his request, it is not error to refuse further instruction asked by him.

FROM the circuit court of Covington county.

HON. ROBERT L. BULLARD, Judge.

Brett, appellant, was indicted, tried and convicted of murder, sentenced to the penitentiary for life and appealed to the supreme court. The facts are fully stated in the opinion of the court.

Robert N. Miller and *Hugh Barr Miller,* for appellant.

George Butler, assistant attorney-general, for appellee.

[The reporter has been unable to find the briefs of counsel in this case, hence no synopsis of them is given herein.]

WATKINS,* Special Judge.

The appellant was indicted by the grand jury of Covington county for the killing of one Daniel G. McCann, which occurred in the town of Mt. Olive on the 8th day of July, 1908. He was convicted of murder, and sentenced to life imprisonment in the state penitentiary. The deceased was engaged in editing and publishing a newspaper at Mt. Olive, and occupied for that purpose a one-story frame building, situated on the south side of the town, facing north. From the roof of the building an awning projected over the sidewalk, which awning extended the entire width of the building. On the east side of this building there was a vacant space of about thirty-six feet in width, and on the west a two-story frame building, the second story of which was occupied by the Cumberland Telephone Company as an ex-

* FLETCHER, J., having been of counsel in this case before his appointment to the bench, was disqualified to preside and William H. Watkins, Esq., a member of the supreme court bar was appointed and presided in his place.

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change. From the latter building a porch or gallery extended from the second story immediately over the sidewalk, which gallery had around it banisters through which there were openings about ten inches in size.

The principal witnesses for the state were one Carl Speed and his wife. Speed claims that, being attracted by the difficulty below, he went to the window, situated at the north end of the second story occupied by the Telephone Company, and while kneeling on the floor, with his elbows in the window, viewed the homicide through an opening in the banisters by looking under the awning which covered McCann's building; that he could see McCann distinctly, but that not more than half of Brett's body could be seen. Mrs. Speed testified that she was standing against the wall, just west of the window out of which her husband was looking, and with her head slightly inclined also viewed the homicide by looking through one of the openings in the banisters and under the awning; it being asserted by both witnesses that McCann was standing, at the time he was shot, at some point on the sidewalk in front of the open space above indicated, a few feet east of the outer wall of the building occupied by him (the exact point being in dispute), and that Brett also stood on the sidewalk near the eastern side of the thirty-six-foot space which intervened. Both of these witnesses testified that from their respective positions they saw the fatal shot fired, and their testimony, if believed by the jury, was very damaging to the appellant.

Counsel for the appellant below at the trial of this case seriously questioned the ability of Speed and his wife to see the homicide, situated as they then were, contending that it was impossible for them to have seen either of the parties. While there were other witnesses for the state directly across the street, one hundred and ten feet distant, who claimed to have seen the homicide, it cannot be doubted but that the truth or falsity of the testimony of Mr. and Mrs. Speed was the most material issue of disputed fact. About three days after the

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trial began, and just prior to the close of the state's case, Speed and one of the attorneys for the prosecution took a photographer to the scene of the killing and had him make some photographs of the situation as the witness Speed claimed it existed. It will only be necessary for us to refer to two of these photographs. Exhibit A was taken by having the photographer place his instrument at a point on the sidewalk in front of the thirty-six foot vacant space east of the building occupied by McCann, where Speed testified that McCann stood when he was shot; and it must be borne in mind that the exact point was a matter of dispute, even among the state witnesses. Then the witness Speed and one of the attorneys for the state went upon the gallery in front of the telephone office, Speed putting himself in the position in which he claims to have been at the time he saw the killing, and the assistant prosecuting attorney putting himself in the position in which it is claimed Mrs. Speed was standing at the time of the occurrence, and the photograph offered as Exhibit A by the state represents Mr. and Mrs. Speed peering through the openings in the banisters under the awning and out to the sidewalk beyond. Exhibit C represents the two-story building occupied by the telephone company, the one-story building occupied by McCann, and the thirty-six foot space east of the McCann building. The assistant prosecuting attorney was standing at a point where Speed testified that the deceased stood at the time the shooting occurred, and the witness Speed himself took the position where he claimed the appellant was standing at the time of the shooting; the photographs being taken from the opposite side of the street. Exhibits A and C were both offered in evidence upon the part of the state, and were objected to by the appellant's counsel on the ground that they were not pictures of the actual occurrence as it took place, but were artistic reproductions arranged by the state's chief witness, and that the photographs did not represent the parties as being where the evidence showed them.

The court sustained the objection made by the appellant in

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reference to Exhibit C, but admitted over the appellant's objection the photograph introduced as Exhibit A. The admission of this photograph was fatal error. In the first place, it was a disputed fact in the case as to whether or not McCann, at the time he was shot, stood at the point taken by the photographer in obtaining the photograph, from which point he was able to depict the faces of the witnesses looking through the holes, under the awning, out to the sidewalk, where Speed says the deceased was standing. In addition to this, Mrs. Speed testified positively that she was a grown woman, about five feet high, and was standing erect on the gallery and viewed the homicide through the opening in the banisters and under the awning by slightly inclining her head, from which position she claimed and testified that she could see McCann and a portion of the body of Brett, while the photograph before us, which was admitted by the court and marked Exhibit A represents Mrs. Speed as being in a stooping position, looking through the hole in the banisters, with her face not more than two and one-half feet from the floor. The precise point involved here is covered by the case of *Fore v. State*, 75 Miss. 738, 23 South. 712, in which the following language was used: "The photographs, and all the evidence touching them, should have been excluded. They were not simply reproductions of the scene of the homicide. They were photographic reproductions of tableaux vivantes, carefully arranged by the chief witness for the state, whereby his version of the tragical occurrence should be brought vividly before the mind's eye of the jury, and be impressed upon the jury as the view of the actual occurrence, and not as the mere statement of the facts of that occurrence as detailed by this witness. Their effect, if not their purpose, was by photographic processes to strengthen and bring out in striking and captivating fashion the version of the difficulty as given the jury in this witness' evidence. We repeat: The pictures were not photographic representations of the scene of the lamentable tragedy. They were artistic reproduc-

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tions of situations carefully planned by the state's chief witness. Their only effect was to engrave upon the jury's memory the account of the homicide given by the witness—an account at variance with that of at least two eyewitnesses of the homicide. That they were hurtful to the prisoner cannot be doubted. Indeed, with the average jury, these dumb witnesses, created by the joint efforts of the state's leading witness and the photographic artist, might go far to secure a verdict for the party offering them."

The giving of instruction No. 1 for the state was erroneous. The instruction is in the following language: "For the state the court instructs the jury that if they believe from the evidence, beyond a reasonable doubt, that the accused willfully and maliciously shot and killed the deceased with a deadly weapon at the time the accused was in no imminent danger, real or apparent, of losing his life or of having some great bodily harm done to him at the hands of deceased, and at a time when the accused had no reasonable ground to apprehend such danger, then the accused is guilty of murder, and the jury should so find, and whether they believe from the evidence that the deceased at the time was armed or unarmed, and whether he was advancing upon the accused or was standing still." In this instruction the word "maliciously" is used as having the same meaning as premeditated design under our statute, or malice aforethought. "Maliciously" and "malice aforethought" do not mean the same thing. Malice comprehends ill will, a wickedness of disposition, cruelty, recklessness, a mind regardless of social duty, etc.; while malice aforethought or premeditated design has a more intense meaning. They comprehend, not only what is included within the term "malice," but in addition thereto mean "premeditated malice." See Am. & Eng. Ency. of Law (2d ed.), vol. 21, p. 133; Bishop's Criminal Law (8th ed.), vol. 1, p. 261; *Patterson v. State,* 66 Ind. 185; *Tutt v. Commonwealth,* 104 Ky. 299, 46 S. W. 675; *State v. Green,* 42 La. Ann. 644, 7 South. 793; *State v. Curtis,* 70 Mo. 594; *Cravey*

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v. State, 36 Tex. Cr. R. 90, 35 S. W. 658; 61 Am. St. Rep. 833; Words and Phrases, vol. 5, p. 4304.

We approve the language used by the Court of Appeals of the state of Kentucky in the case of *Tutt v. Commonwealth,* 104 Ky. 299, 46 S. W. 675, in passing on the identical question: "There can be no question but what malice aforethought is indispensable to a conviction for murder in all cases of homicide, and, in order to convict a party charged with murder, it is indispensable that the jury shall believe to the exclusion of a reasonable doubt that the defendant not only killed the person, but that such killing was with malice aforethought. It will be seen that the instruction given omits any reference to the question of malice aforethought, but instructs the jury, if the killing be willful, felonious, and malicious, that they may find him guilty of murder, and fix his punishment at death or confinement in the penitentiary for life. The extreme penalty of the law was inflicted by the verdict of the jury. It is not deemed necessary to cite authority in support of the proposition that the instruction quoted is erroneous. The practice, so far as we are advised, is to always include, in an instruction on the subject of murder, that to constitute the offense of murder the killing must have been with malice aforethought; and, inasmuch as no person can be guilty of the offense of willful murder without malice aforethought, it necessarily follows that the instruction given must conform to the law."

We are fully aware of the fact, however, that our own court, as well as courts of last resort of other states, have frequently used the word "malice" as being synonymous with "malice aforethought." This use, however, is not accurate. This instruction, however, is not open to the objection urged by counsel for the appellant as being on the weight of the testimony. In all other respects the instruction is correct. Instruction No. 3 for the state is subject to practically the same criticism.

There was no error in refusing any of the instructions for the appellant assigned as error, since every phase of appellant's

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Statement of the case.

case was fully covered by the twenty-six instructions given by the court.

For the errors indicated, the judgment is reversed and the cause remanded. *Reversed.*

MARY E. SAUNDERS v. GEORGE W. STEPHENSON, EXECUTOR, ETC.

[47 South. 783.]

ESTATES OF DECEDENTS. *Probate of claims. Code* 1892, § 1932. *Code* 1906, § 2106. *Creditor himself must make the affidavit. Husband and wife.*

Code 1892, § 1932 (Code 1906, § 2106), peremptorily requires that the creditors shall make the affidavit therein specified in order to probate a claim against the estate of a decedent; and a husband cannot make the affidavit required to probate his wife's claim, as her agent or otherwise, without reference to reasons given why she failed to make it.

FROM the circuit court of Marshall county.

HON. WILLIAM A. ROANE, Judge.

Mrs. Saunders, appellant, was plaintiff in the court below; Stephenson, executor, appellee, was defendant there. From a judgment in defendant's favor plaintiff appealed to the supreme court.

The suit was upon a promissory note, alleged to have been executed in his life time by defendant's intestate, payable to plaintiff. The affidavit upon which its alleged probate was based was made by plaintiff's husband and not by plaintiff herself. On the trial of the case in the court below, the introduction of the note in evidence being objected to by defendant, plaintiff offered to introduce testimony affirmatively showing that her husband who made the affidavit was her agent in so doing, thereunto specially authorized, and that plaintiff was at the time seriously ill, and had been since the death of the dece-

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dent and so remained for a year afterwards, and was wholly disabled to attend to her business affairs, or to leave her home.

The court below held the proffered testimony incompetent and would not allow the note to be read in evidence.

W. V. Sullivan, for appellant.

The law was not intended to defeat but to promote the ends of justice. To say that the husband and agent of an invalid wife, personally and perfectly cognizant of all the facts connected with the contraction of a debt and the execution of a note therefor could not probate such a note against the debtor at the request and direction of that invalid wife—is such a monstrosity that it does not require citation of authority from any source whatever. The court should have permitted the note and the testimony showing the surroundings connected with the probate all to have gone to the jury and not swept away upon this cobweb defendant's rights.

If it has come to that point where substantial rights shall be swept away by such flimsy objections as here are urged, it were well to consider and reflect upon whether or not the courts are organized to defeat or administer justice.

Mayes & Longstreet, for appellee.

The case must be affirmed on the authority of *McWhorter v. Donald,* 39 Miss. 779.

It is noteworthy that in this case we have not yet found anywhere in ths record a statement made by Mrs. Saunders herself, even by deposition, under her oath or otherwise, that the debt was due and unpaid. Mr. Saunders says he knows it to be so, but the statute requires that she shall so say, and that she shall say it under oath.

FLETCHER, J., delivered the opinion of the court.

The affidavit, upon which the note sued on was probated, was not made by the creditor, but by her husband as her agent.

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Statement of the case.

This brings the question squarely within the holding of this court in *McWhorter v. Donald,* 39 Miss. 779, 80 Am. Dec. 97. It is true that appellant here offers some excuse for not making the affidavit which the statute requires, and also true that this excuse was wanting in the *McWhorter case;* but the decision is that case is based upon the peremptory requirement of the statute, a departure from which is fatal. *Cheairs v. Cheairs,* 81 Miss. 662, 33 South. 414; *Walker v. Nelson,* 87 Miss. 268, 39 South. 809. *Affirmed.*

GEORGE R. EDWARDS v. GEORGE W. BUTLER.

[47 South. 801.]

TAXATION. *Void tax sale. Improvements. Compensation for.*

A purchaser of land at tax sale who, in good faith believing that he was the owner, placed valuable and permanent improvements upon it, is entitled to compensation therefor, although his title be void because the land was school land and not taxable when assessed and sold.

FROM the chancery court of Quitman county.

HON. PERCY BELL, Chancellor.

Edwards, appellant, was complainant in the court below; Butler, appellee, was defendant there. The case was once before in the supreme court and is reported. *Edwards v. Butler,* 89 Miss. 179, 42 South. 381. The court below on remand of the case adjudged appellee's tax title void because the lands when assessed and sold for taxes were school-lands and not taxable; it, however, allowed the appellee compensation for valuable and permanent improvements placed by him on the lands in good faith, believing himself to be the owner. The appellee, being dissatisfied with the allowance appealed therefrom to the supreme court.

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Brief for appellee.

W. R. Harper, for appellant.

It will be remembered by this court that Butler claimed the land under a tax title, and Edwards claimed it directly from the state, and this court held that the tax sale to Butler was absolutely void, because the land was held by the state in trust for the Chickasaw School fund, and that as such, it was not, and never had been, liable for taxes. Since the land was Chickasaw School land, and was held by the state in trust, the title of the state to the same being not only of record, but notorious, and could have been known of all men, and since improvements were erected and made on the land while so held by the state, which holding was not only of record, but within the common knowledge of every man of ordinary intelligence, a purchaser of such land at a tax sale could not be, within the meaning of our statute, a *bona fide* purchaser. Butler could not have recovered for these improvements if his action had been brought against the state, and Edwards, having purchased from the state, is liable to exactly the same extent, and no further, than the state would have been for improvements.

St. John Waddell, for appellee.

The single contention is that because the lands in controversy were held by the state as Chickasaw School lands at the time the improvements were made by the appellee, he is not entitled to recover for same.

The general rule is, that where the defendant in ejectment or in equity claims, under color of title and in good faith, he shall be allowed for such improvements. It has also been held that a tax title constitutes color of title, and in fact this proposition seems to need very little citation of authority. It is, however, supported by the following authorities: 16 Am. & Eng. Ency. of Law, 93; *McCann v. Smith* (Ark.), 45 S. W. 1057; 22 Cyc. 23.

The remaining question seems to be as to whether or not this general rule applies where the lands were held by the state and were not subject to tax sale. This question it seems to me to

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Brief for appellee.

be quite important, as it invokes an exception to the general equity rule. It has always been a rule in equity, that as a condition to equitable relief, the person seeking recovery of lands would be required to pay the value which he receives in valuable improvements made on the land in good faith. Code 1906, § 1848, brought forward from Codes 1880 and 1892.

The appellee when he purchased from the state, purchased the lands as Chickasaw School lands at a fixed price of $6.00 per acre, and this price was based on the lands being wild lands and not improved, and hence he did not pay to the state the value of the improvements made by appellee. And it is but an application of the equity doctrine that he who seeks equity will be compelled to do equity, and this applies rather to the remedy than to the right. 3 Pomeroy's Eq. Jurisprudence (3rd ed.), § 1241. A denial of this equitable right to improvements would be a particular hardship in Mississippi where there is such large number of titles held under tax sales, and many of them of this particular character of lands.

The mistake of the innocent purchaser and for which he is made to suffer by loss of the lands, is always induced by the fault of the state in carrying as assessable lands and selling the same as such, lands which it holds in another right, and reclaims under such other right. It is therefore peculiarly inequitable for the state after selling these lands under one right, to re-claim them under another right, and then deny relief for improvements of which the owner gets the benefit, but which were made under a title derived from the state itself. This claim of a person having possession of, and making improvements on, lands belonging to the state under an invalid tax sale is certainly as strong as the claim of right of one having possession of, and making improvements on, public lands under an invalid patent.

Judge MILLER in *Wells v. Riley,* Federal Cases, 17,404, held that one who makes entry on public lands, under an invalid patent, could recover for improvements as under the color of title.

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Syllabus.

The case here would seem to be a stronger case for improvements than that in favor of one who merely makes an invalid entry, which he believes is justified under the Homestead Act.

Judge DILLON (surely an eminent authority), in *Litchfield v. Johnson,* Federal Cases, 8,387, held that an invalid entry made in good faith, under the Homestead Act, on public lands, give such claim of title as will entitle the person making the entry to recover improvements under the provisions of a statute similar to Code 1906, § 1848.

WHITFIELD, C. J., delivered the opinion of the court.

The judgment of the court below is correct. It was proper, on the facts of this case, to allow the value of the improvements. This is clearly settled by the case of *Litchfield v. Johnson,* 15 Fed. Cas. 590 (No. 8,387), and *Wells v. Riley,* 29 Fed. Cas. 675 (No. 17,404), and by our own case of *Hicks v. Blakeman,* 74 Miss. 459, 21 South. 7, Ib. 400. *Affirmed.*

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY v. GEORGE W. BENT ET AL.

[47 South. 805.]

1. CARRIERS. *Contracts. Freights. Regulations.*

Contracts for the carriage of freights by common carriers are subject to regulations under the law, and when a lawful regulation has been imposed the carrier cannot evade it by any printed form of contract required to be signed by the shippe

2. SAME. *Same. Construction.*

Stipulations in contracts for carriage, inserted entirely for the benefit of the carrier, will be strictly construed.

3. SAME. *Same. Constitutional law. Due process of law. Constitution* 1890, *sec.* 14. *Amendment* XIV, *constitution of U. S. Code* 1892, § 4299. *Code* 1906, § 4851. *Interstate commerce.*

Code 1892, § 4851, Code 1906, § 4851, providing that every bill of lading acknowledging the receipt of property for transportation

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Opinion of the court.

shall be conclusive evidence in the hands of a *bona fide* holder, as against the carrier, that the property had been so received:—

(*a*) Makes certain acts voluntarily done by a carrier conclusive, creates a substantive rule of law, and is not invalid as depriving the carrier of property without due process of law; and

(*b*) It is not invalid as a regulation of interstate commerce when applied to interstate shipments; and

(*c*) A bill of lading issued by a common carrier describing a shipment of cotton linters as containing a designated number of pounds is conclusive on the carrier as to the weight, in the hands of a *bona fide* holder, although the same contain, printed above the column for the insertion of weights, the words, "Weights subject to correction."

FROM the circuit court of, first district, Hinds county.

HON. WILEY H. POTTER, Judge.

Bent and others, appellees, composing a copartnership doing business under the firm name, "Bent & Company," were plaintiffs in the court below; the railroad company, appellant, was defendant there. From a judgment in plaintiffs' favor defendant appealed to the supreme court. The facts are stated in the opinion of the court.

Mayes & Longstreet, for appellant.

Watkins & Watkins, for appellees.

[The reporter has been unable to find the briefs of counsel in this case, and for that reason no synopsis of them is given.]

MAYES, J., delivered the opinion of the court.

The controversy in this case arises under Code 1892, § 4299, Code 1906, § 4851. That section is as follows:

"Every bill of lading or other instrument in the nature or stead thereof acknowledging the receipt of property for transportation, shall be conclusive evidence in the hands of a *bona fide* holder for value, whether by assignment, pledge, or otherwise, as against the person or corporation issuing the same, that the property had been so received."

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Opinion of the court.

The substantial facts of the case, as agreed upon in the record, are as follows:

On the 10th day of June, 1905, the railroad company issued to the Buckeye Cotton Oil Company, at Greenwood, Miss., ten bills of lading, covering two hundred and fifty bales of cotton linters, delivered to the railroad company for shipment to Bent & Co., at Boston, Mass., on the order of Hood & Co., of Jackson, Miss., the cotton to be delivered to Bent & Co., Boston, on presentation of the bill of lading. The railroad company duly issued its bills of lading for the cotton and it is agreed that the bills of lading stated on their face that the aggregate was one hundred eighteen thousand, four hundred twenty-five pounds. These bills of lading have, above the column where the weights are to be inserted, the following: "Weights subject to correction." The oil company attached the bills of lading to a sight draft on Hood & Co., of Jackson, Miss., predicating the amount drawn for of the value per pound of the cotton linters as shown by the weights in the face of the bill of lading issued by the railroad company. Hood & Co., received the bills of lading and paid the drafts attached thereto, and forwarded same to Bent & Co., of Boston, Mass., attaching the bill of lading to drafts on Bent & Co., adopting as the basis of the drafts the weights stated in the bills of lading issued by the railroad company. The cotton linters was transported by the Yazoo & Mississippi Valley Railroad Company and connecting carriers, in unbroken packages, from Greenwood, Miss., to Boston, Mass., and delivered to Bent & Co. The same two hundred and fifty bales of cotton linters received by the defendant company at Greenwood were delivered to Bent & Co., in Boston.

The bills of lading, with the drafts attached, drawn by Hood & Co. on Bent & Co., of Boston, were forwarded and paid by Bent & Co., and after payment of same and reweighing the cotton it was ascertained by Bent & Co., the weights were twenty thousand, nine hundred and eighty-four pounds short, aggregating in value $786.90, which amount of shortage was paid in full by Bent & Co. to Hood & Co.; that is to say,

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Bent & Co. paid for the quantity of cotton linters which the bills of lading showed had been shipped to them, and without notice of the fact that there was any shortage until after payment, unless the statement in the bill of lading, "weights subject to correction" was notice. It is further agreed that Bent & Co. relied on the weights stated in the bills of lading and that Hood & Co., who shipped the cotton linters to Bent & Co. had no notice or knowledge of any discrepancy in the weight, other than the statement in the bills of lading, that the weights were "subject to correction." It is also agreed that, in paying the freight on the shipment, the freight was paid according to the weight stated in the bill of lading and accepted by the defendant on that basis. The agreement further shows that the cotton linters were not weighed by the railroad company, but that it was customary to permit the oil company to do its own weighing, and in this instance this was done, and the weights were written into the bills of lading by the oil company, and not by the carrier; but the bills of lading were issued and adopted by the carrier as its bills of lading, and nothing in the bills of lading indicated that they were prepared by any party other than the railroad company.

On these agreed facts a judgment was rendered by the trial court in favor of the plaintiff for the sum of $893.37, being principal and interest on the alleged value of the shortage, and from this judgment the defendant appeals.

While the facts show that the oil company placed the weights in the bills of lading for the railroad company, there is no issue of fraud made by the pleadings or the proof; nor is there any contention that the nature of the goods in this case is such that a loss in weight is natural, either from the operation of the elements on the character of goods, or as a natural result of being housed up for a period of time; nor is there any error apparent on the face of the bill of lading of any kind. We merely state these things to show what the real facts of this case are. The facts of this case bring it literally within the rule declared in

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the case of *Loyd v. Railroad Company,* 88 Miss. 422, 40 South. 1005, unless this case is to be reversed on the contentions of counsel for appellants on questions raised in this case for the first time, and not decided in the case *supra.*

It is first contended in this case that Code 1906, § 4851, has no application, for the reason that the bills of lading here provide that the weights are "subject to correction." Counsel for appellant therefore contend that, since the court has held in the case of *Hazard v. Illinois, etc., R. Co.,* 67 Miss. 32, 7 South. 280, that the statute in question is not a mere rule of evidence, but designed to change the character and legal effect of the contract evidenced by the bill of lading, therefore, say counsel for appellant, the party who takes under the bill of lading must take in accordance with the whole contract as formed by the statute and the bill of lading, and, since the bill of lading provides that the weights are subject to correction, this provision cannot be repudiated by a party claiming to be a *bona fide* holder of the bill of lading, since by its very terms the bill of lading puts the party on notice of its right to correct discrepancies in weights. If this contention be sound, the statute in question would be of little use, since, by stamping on the face of every bill of lading that the weights were subject to correction, it would have the effect of writing out of the law this statute. These bills of lading cannot be considered as contracts in the ordinary sense in which the word "contract" is used. A common carrier owes a duty to the public not imposed upon an individual. Such contracts are subject to regulation under the law, and when a lawful regulation has been imposed it is not within the power of the carrier to destroy the regulation by any printed form of contract required to be signed by shippers. As was said in the case of *Laskey v. Southern Express Company,* 92 Miss. 268, 45 South. 869: "Stipulations in shipping contacts of the character under discussion are made entirely for the benefit of the carrier, and will receive strict construction, to the end that through it just claims of shippers may not be defeated by dilatory methods in

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handling the claim. These stipulations are made on the back of contracts of shipment, and are rarely read by the shipper, and the one ground upon which they can be upheld is that they are reasonable regulations—not contracts in the true sense." In the case of *Railroad Co. v. Insurance Co.*, 79 Miss. 114, 30 South. 43, the court said: "The common carrier must at all times be ready and willing to contract with the shipper on the terms and conditions imposed by law. If the carrier desire to limit its common-law liability, it can only do so by special contract with the particular shipper, freely and fairly entered into, and upon sufficient consideration." When the rule laid down in these two cases is applied, it is seen that this court has repudiated the idea that these printed stipulations may be given the force of a contract, fully, freely, fairly, and voluntarily entered into by private parties, but regards such stipulations more as regulations made by the carrier for its own benefit, the validity of which must depend on reasonableness and consistency with the general law.

The next contention of counsel for appellant is that the statute itself is void, because it violates section 14 of the Constitution of the state, and the fourteenth amendment to the Constitution of the United States, in that it undertakes to prescribe a conclusive rule of evidence, thereby taking away from the courts their constitutional powers to investigate and pass upon facts, resulting in a deprivation of property without due process of law. In support of this contention one case is cited. That case is *Missouri, etc., Ry. Co. v. Simonson*, 64 Kan. 802, 68 Pac. 653, 57 L. R. A. 765, 91 Am. St. Rep. 248, decided by the Kansas supreme court on a statute not identical with, but similar to, the statute under discussion. We shall notice this decision later. Suffice it to say here that this decision was rendered by a court consisting of seven judges, three of whom dissented, and this case stands alone in its holding, so far as any other case has been cited by counsel, and in so far as a most painstaking search has revealed to us. The cases cited in the opinion of the majority do not sustain the decision, and are

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readily differentiated from the question the court was considering, while the dissenting opinion, amply supported by authority from the supreme court of the United States and other courts, is by far the stronger and the correct view. In the case of *Hazard v. Illinois, etc., R. Co.*, 67 Miss. 32, 7 South. 280, this court has already held that this statute was not a mere rule of evidence, but was designed to change the character and legal effect of the contract evidenced by the bill of lading. So, we see, in the case above cited, we have a declaration by this court that, though the legislature has spoken of this statute as furnishing conclusive evidence, etc., it is in truth not a statute merely enacting a rule of evidence, but making certain acts, voluntarily done by the railroad company, operate by way of estoppel to establish an incontrovertible contractual liability. In short, it precludes the railroad company from showing the untruth of that which they have asserted to be true in their bill of lading when same reaches the hands of a *bona fide* holder for value. This statute creates a substantive rule of law, the end and aim of which is to promote justice, accuracy, and fairness. Mr. Wigmore, in his work on Evidence, in a note to be found in volume 2, p. 1667, says: "Legislators frequently seem to believe that something is gained by labeling such statutes rules of evidence." But, when the effect of the statute is to create a rule of substantive law, the statute cannot be invalidated because of its label. Again, in volume 2, p. 1665, § 1353, same authority, it is said: "So far as a so-called rule conclusive evidence is not a rule of evidence at all, but a rule of substantive law, it is clear that the legislature is not infringing upon the prerogative of the judiciary." Again, in section 1354, paragraph 1, it is stated that: "A statute which makes more stringent the rule of responsibility for a tort, by substituting some other tests than negligence, is constitutional. So, also, a statute which enlarges the rules of contract by creating an estoppel is constitutional, as when the terms of a bill of lading or of a policy of insurance are declared to be 'conclusive' in certain respects."

In the case of *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 19

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Sup. Ct. 281, 43 L. Ed. 552, the supreme court of the United States upheld a Missouri statute compelling fire insurance companies, in case of total loss, to pay the amount for which the property was insured, less depreciation between the time of issuing the policy and the time of loss, holding that such a statute did not deprive the insurer of property without due process of law, because it left the parties to fix the valuation of the property as they chose, merely making their action conclusive after they had voluntarily entered into it. In this case the court said the insurers are left "to fix the valuation of the property upon such prudence and inquiry as they choose. It only ascribes estoppel after this is done—estoppel, it must be observed, to the acts of the parties, and only to their acts in open and honest dealing." The court further said that the law only made these contracts of insurance "true contracts of assurance, not seemingly so, but really so; not only when premiums are paying, but when loss is to be paid. The state surely has the power to determine that this result is desirable, and to accomplish it even by a limitation of the right of contract claimed by plaintiff in error." The statute under discussion is a statute similar to the Missouri statute. The statute operates by way of estoppel, and makes the bill of lading containing the weights on which the railroad company collect freight the true weight. By this statute it is precluded from making its weights the basis on which to collect freight merely; but in the hands of a bona fide holder for value, who has purchased the goods on the faith of the weight promulgated by it; it is estopped from afterwards denying it to be the true weight.

In the case of *Missouri Ry. v. Simonson,* 64 Kan. 802, 68 Pac. 653, 57 L. R. A. 765, 91 Am. St. Rep. 248, the statute was different from the statute here. The Kansas statute made the bills of lading conclusive proof as to the weight stated therein, not in the hands of a bona fide holder for value, as is the case with our statute, but in the hands of all parties. The dissenting opinion in the above case clearly shows that the opinion of

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the majority is unsound and that the authorities relied on therein do not support it. Chief Justice Doster, in dissenting in the above case, says: "I dissent from the judgment of the majority of the court that the Legislature may not give to the receipt contained in a bill of lading issued by a common carrier a conclusive effect as evidence of the weight of the thing receipted for, and am authorized to say that Justices Smith and Ellis likewise dissent. A proposition in denial of the legislative power in the case stated is incomprehensible to me. There is not a case in the books which in principle or in similarity of facts affords ground for the majority opinion. The instances in which the exercise of the power in question has been attempted are not numerous. Nearly all of them were cases in which the Legislature sought to give tax deeds a conclusive effect to establish the substantive rightfulness of tax-sale proceedings. This class of cases was not adverted to by the majority, because of the obvious fact that in such cases the act from which it was sought to derive a conclusive effect was clearly the act of an adversary party, and the effort was to find those in which the legislature had exceeded its authority by undertaking to found presumption of conclusiveness upon the act of the party himself. This could not be done. There are no such cases; that there are no cases in denial of the legislative right to found estoppel upon the contract act of a party, and that—and it is—is the case in hand. There are, however, decisions of a different character, which my associates have mistakenly regarded as authority for their holding. For instance, in one of them, as cited in the majority opinion, it appeared that the legislature had declared a conclusive presumption of negligence from the killing of live stock (*Little Rock & Ft. S. R. Co. v. Payne*, 33 Ark. 816, 34 Am. Rep. 55); in another it declared a conclusive presumption of assent to a trespass from a failure to aply to the courts to enjoin it (*Meyer v. Berlandi*, 39 Cal. 438, 40 N. W. 513, 1 L. R. A. 777, 12 Am. St. Rep. 74); in another it declared an officially published schedule of

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railway rates conclusive evidence of their reasonableness (*Chicago, M. & St. P. R. R. Co. v. Minnesota,* 134 U. S. 418, 10 Sup. Ct. 702, 33 L. Ed. 970, 3 Interst. Com. R. 209); and in another case it sought to make a minor's declaration as to his age conclusive on his legal guardians (*Wantlan v. White,* 19 Ind. 470). It must be observed that in the cases of the tax deeds and the schedule of railway rates and the minor's enlistment oath the Legislature sought to bind interested parties by the adversary action of others, not by any action of their own, and in the cases of the imputed negligence and the imputed assent to the trepass sought to bind them by accidental circumstances involving them in no manner of contractual relation. Manifestly all such cases are to be governed by a principle different from that to be applied when it is sought to found the presumption on the conventional act or agreement of the party himself. I may well object to a law which from the hostile act of another seeks to raise against me a conclusive presumption, and I may well object to a law which seeks to found an estoppel against me upon some undesigned and easily explicable circumstance; but I can have no objection to a law which merely seeks to give to my own deliberate business engagement a conclusive and irrevocable effect. Judge Cooley notes the distinction between the two classes of cases in the very quotation made from him in the majority opinion. In discussing the subject of the power of the Legislature over the rules of evidence, he says: 'Except in those cases which fall within the familiar doctrine of estoppel at the common law, or other cases resting upon the like reasons, it would not, we apprehend, be in the power, of the Legislature to declare that a particular item of evidence should preclude a party from establishing his rights in opposition to it.' The Legislature, therefore, in this case, has rested its enactment on the very exception noted by Judge Cooley, viz., estoppel or like reasons."

And again: "It is true the courts have not elevated a mere receipt to the grade of an estoppel; but they have often held

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other like written engagements and declarations of the existence of facts to be such. This has been especially true when one of the contracting parties has done or paid something as a consideration or equivalent for the engagement or declaration. This case, for aught we know, may be one falling within the rule, because here the shipper may have paid freight money on the basis of weight specified in the bill of lading. But admitting as should be done, that the courts have not advanced the doctrine of estoppel to cover such class of cases, ought it to be said that the Legislature is constitutionally powerless to do so—that is, powerless to make that conclusive evidence which the courts themselves hold to be presumptive evidence; powerless, for the sole reason that some instances of meritorious defense on the ground of mistake will be shut out? If we were required to search for reasons for the enactment in question, we would not have to go far. The reason is to be found in the character of railways as common carriers. The relations existing between the public and the carriers make the regulation of the latter in many particulars not merely advisable, but highly important. It cannot be said, therefore, that a statute forbidding the carrier to dispute in court a written admission made by it as a basis of contract liability is an unwarranted exercise of legislative power. It must be borne in mind that the business of a common carrier is one which is 'clothed with a public interest.' That was pithily remarked by Sir Matthew Hale nearly four hundred years ago. It was quoted by the supreme court of the United State in *Munn v. Illinois,* 94 U. S. 113, 24 L. Ed. 77, and made the basis of the decision in that case and in many subsequent ones decided by that and other courts. Now, pretermitting the question as to the power of the Legislature to found a conclusive presumption upon the admissions of private individuals, it cannot be doubted, in my judgment, that it possesses the power to declare that a receipt for goods, given by a transportation company in the conduct of its public business as a common carrier, shall be conclusively deemed and held to express the measure of the liability incurred."

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It is thus seen that this case cannot be considered as sound authority for the proposition that this statute is unconstitutional because it violates the due process clause of the Constitution of either the state or the United States.

The third contention of counsel is that the statute is unconstitutional because it is an attempt to regulate interstate commerce, and in support of this proposition cites the cases of *Central R. Co. v. Murphey,* 196 U. S. 194, 25 Sup. Ct. 218, 49 L. Ed. 444, and *Houston, etc., R. R. Co. v. Mayes,* 201 U. S. 321, 26 Sup. Ct. 491, 50 L. Ed. 772. We do not think the cases cited have any bearing on this case. The statute in question attempts no sort of regulation of interstate commerce; neither does it impose any burden on same. All that the statute requires is that, when a bill of lading is issued, it speak the facts correctly. The railroad company owes it as a duty to the purchasers of goods bought on the faith of their statements as to weight that the bills of lading be accurate. The railroad has the power to make its bills of lading accurate. When it does not do so, it is its own neglect, and it should be the sufferer, and not an innocent party suffering by that neglect.

In the case of *Central R. Co. v. Murphey,* 196 U. S. 194, 25 Sup. Ct. 218, 49 L. Ed. 444, there was a Georgia statute which undertook to impose on the initial carrier, as a condition of availing itself of a provision in its contract of transportation that it would assume no liability beyond its own line, the duty of informing the shipper, in writing, when, where, and how, and by which carrier, the freight was lost, damaged, or destroyed, and of giving the names of the parties and their official position, if any, by whom the truth of the facts set out in the information could be established, within thirty days after application to trace same, the initial carrier should be liable just as if the damage had occurred on its own line. The court held the statute of Georgia void as imposing a burden on interstate commerce, and very pointedly said: "The railroad company receiving the freight from the shipper has no means of

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compelling the servants of any connecting carrier to answer any questions in regard to the shipment, or to acknowledge its receipt by such carrier, or to state its condition when received; and when it is known by the servants of the connecting company that the object of such questions is to place in the hands of the shipper information upon which its liability for the loss or damage to the freight is to be based, it would seem plain that the information would not be very readily given, and the initial or other carrier could not compel it. The effect of such a statute is direct and immediate upon interstate commerce. It directly affects the liability of the carrier of freight destined to points outside the state, with regard to the transportation of articles of commerce. It prevents a valid contract of exemption from taking effect, except upon a very onerous condition; and it is not of that class of state legislation which has been held to be rather an aid than a burden upon such commerce." The section of the statute brought into review by this case—that is to say, section 4851, Code 1906—may be said to belong to that class of state legislation that is in aid of, rather than a burden upon, interstate commerce. Any legislation which in no way impedes transportation, which does not of itself impose liabilities growing out of the negligence or acts of adversary parties, but merely promotes accuracy, leaving the transportation companies free to contract and free to make all reasonable and lawful regulations, can in no sense be considered as imposing a burden on interstate commerce.

The case of *Houston Ry. Co. v. Mayes,* 201 U. S. 321, 26 Sup. Ct. 491, 50 L. Ed. 772, has no application to this case. That was a case where the Texas statute provided that, if a railroad company failed to furnish cars to a shipper within a certain number of days after requisition in writing had been made by the shipper, the railroad company should be penalized the sum of $25 per day, excepting only where the failure occurred by reason of strikes or other public calamity. The Supreme Court of the United States declared this statute uncon-

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stitutional as a regulation of interstate commerce, and among other things said: "While railroad companies may be bound to furnish sufficient cars for their usual and ordinary traffic, cases will inevitably arise where, by reason of an unexpected turn in the market, a great public gathering, or an unforeseen rush of travel, a pressure upon the road for transportation facilities may arise which good management and a desire to fulfill all its legal requirements cannot provide for, and against which the statute in question makes an allowance." These two cases are easily distinguishable from the case on trial, and these authorities do not in any way sustain the contention of counsel.

In the case of *St. Louis & San Francisco Ry. Co. v. Matthews,* 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611, the supreme court of the United States upheld a Missouri statute making the railway company liable for all property destroyed by fire from its locomotives, whether the fire was occasioned by negligence or not. It was not thought in that case that the Missouri statute violated any clause or section of the Constitution of the United States. In the case of *Missouri Ry. Co. v. Simonson,* 64 Kan. 802, 68 Pac. 653, 57 L. R. A. 768, 91 Am. St. Rep. 248, above referred to, the court holds that the Kansas statute referred to is not a violation of the interstate commerce clause of the Constitution of the United States, the court observing that: "It does not regulate rates, nor levy taxes, nor impose restrictions of any kind on commerce between the states. It is a police regulation, designed to promote accuracy in dealings between shippers and carriers." *Affirmed.*

WHITFIELD, C. J., delivered the following specially concurring opinion.

Treating the statute involved, and which is assailed as unconstitutional, as impairing the obligation of the contract and depriving of property without due process of law, as one which enlarged the rules of contract, by creating an estoppel, it seems to me clear that such statute is not unconstitutional. Mr. Wig-

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more, in volume 2, § 1354, of his work on evidence says this in respect to such a statute: "So, also, a statute which enlarges the rules of contract by creating an estoppel is constitutional, as when the terms of a bill of lading or of a policy of insurance are declared to be 'conclusive' in certain respects." And in so stating the law he clearly approves the doctrine announced by Doster, C. J., in his dissenting opinion in the case of *Missouri, K. & T. R. Co. v. Simonson,* 64 Kan. 802, 68 Pac. 653, 57 L. R. A. 768, 91 Am. St. Rep. 248, decided in 1902. He says that Doster, C. J., put it on the ground that those statutes which bind the interested parties by the adversary action of others may be invalid, but that the statute (identical with our statute) merely applied the doctrine of estoppel to the party's own act. I think this is the exact statement of the correct principle on this subject. What this statute does is to hold that the railroad company, issuing a bill of lading under this statute, and under the circumstances clearly shown in the opinion in chief in this case, is simply estopped to contradict the recitation in the bill of lading as to the weights of the cotton received and transported by it.

It is earnestly insisted for the appellant that the clause, "Weights subject to correction," is a term of this contract, and that, even treating the contract as composed of the bill of lading and also this statute written into the bill of lading, this statute is unconstitutional, because it deprives the railroad company of its property without due process of law, and also impairs the obligation of this term of the contract—"Weights subject to correction." I think this argument as to the unconstitutionality of this clause of this statute is fully answered by giving to this clause its manifest meaning. What is that meaning? Just this: That all such variations in weight as may be due to natural causes, atmospheric conditions, mistakes in addition, appearing on the face of the bill of lading, and other such incidental variations in weight, may be corrected; and this correction of these incidental and nonessential variations in weight

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manifestly would have been allowed under the general law, without reference to any such clause in the statute. But such corrections as to weights as have the tremendous effect of changing the weights by so much as one-half, one-third, or one-fifth, or other manifestly substantial proportion, never were intended to be allowed by his clause in the statute; and since the whole argument assailing the constitutionality of this clause of the statute is based solely on the erroneous interpretation of this clause, which would make it have this latter meaning, that argument, since that interpretation is manifestly unsound, falls at once to the ground. *Affirmed.*

HENRY M. QUILLAN v. GEORGE C. PAINE.

[47 South. 898.]

SALES OF PERSONALTY. *Lien for purchase money. Code* 1906, §§ 3079, 3080. *Proceedings to enforce. Claimant's issue.*

Under Code 1906, §§ 3079, 3080, giving the seller of personalty a lien thereon for the unpaid purchase price while the property remains in the hands of the first purchaser, and providing that in proceedings to enforce the lien the property shall be dealt with as in an attachment for debt, a third party may in such a proceeding propound a claim to the property and the same should be tried as if the case were an attachment suit.

FROM the circuit court of Monroe county.

HON. EUGENE O. SYKES, Judge.

Paine, appellee, was plaintiff in the court below; one Howell was defendant there and Quillan, appellant, was the claimant. The proceeding was a suit, under Code 1906, §§ 3079–3081, to enforce a purchase money lien on personal property. The plaintiff recovered against defendant Howell and when the claimant's issue was reached the court below dismissed the claim, holding that there was no provision of law authorizing the propounding of such a claim in a statutory proceeding by the

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Brief for appellant.

seller of personalty to enforce a lien for unpaid purchase price, and the claimant appealed to the supreme court.

W. H. Clifton, for appellant.

The possession of the law must not be disturbed; but all claimants must present their right of property by claimant's issue, worked out in the original suit. Code 1906, § 4237. *Berheimer v. Martin,* 66 Miss. 486.

And this distinctive policy of our law has been extended by statute to seizure of personal property by the law officer under almost every writ known to the law. That policy is, that when personal property has been seized by the sheriff under legal process and is *"in custodia legis,"* and a third party claim title or right to it, he must litigate that right in the original suit or proceeding by claimant's issue, as illustrated in the following proceedings and under the following writs or final process, when personal property is seized under execution and a third party "claims to be the owner of or have a lien on it." Code 1906, §§ 4990, 4992.

This procedure and trial of right of property by claimants is extended to seizure of personal property under attachment writs. Code 1906, §§ 163, 153.

When seizure is under writ of replevin, Code 1906, § 4237.

When seizure is under attachment for rent or distress warrant, Code 1906, § 2868. *Thomas v. Shell,* 76 Miss. 556, 24 South. 876; *Watkins v. Duvall,* 69 Miss. 364, 13 South. 727.

When levied is under writ of seizure to enforce employees' lien, Code 1906, § 3049.

When levy is under writ of seizure to enforce lien for purchase money, Code 1906, §§ 163, 153, 3080.

The statute, Code 1906, § 3080, commands the officer "to seize the property and deal with it as in case of attachment for debt." The chapter on attachments for debt, §§ 163, 153, makes "All provisions of law in relation to third persons claiming property levied on by virtue of *fieri facias* extend and apply to claimants of property levied on by writs of attachment.

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Opinion of the court.

McFarland & McFarland, for appellee.

The trial court was entirely correct in sustaining appellee's motion to dismiss. Appellant did not pursue the proper course, and the case was properly thrown out of court.

Counsel for appellant insists that appellant has the right to contest this case as he would had it been an attachment for debt, relying upon the language of section 3080 to sustain his position. We respectfully urge that his view is erroneous, that part of the section referring to the code sections on attachment for debt applying strictly to the manner in which the sheriff or constable shall proceed; the method of procedure for the court and parties interested being mapped out in the balance of sections 3080, 3081.

By no method of construction can the clause mentioning attachments for debts be made to refer to any person other than the sheriff or constable.

MAYES, J., delivered the opinion of the court.

On the 17th day of August, 1907, George C. Paine began a proceeding in the justice of the peace court under section 3079, Code of 1906, for the purpose of subjecting certain personal property sold by him to one Jesse W. Howell to a debt for the purchase money thereof, amounting to the sum of $195. On the same date one Henry M. Quillan, trustee in a deed in trust executed by Howell in favor of Gilmore, May & Co. on the property in question, and wherein Quillan was made trustee, interposed as claimant of the property after condition broken. Jesse Howell waived service of process and consented that judgment be entered against him for the amount of the claim due by him to Paine. Issue was made up between the claimant and Paine, and the case tried in the justice court, resulting in a judgment in favor of Paine, condemning the property to be sold for the payment of the purchase money, and dismissing the claimant's issue. From this judgment an appeal was prosecuted to the circuit court by the claimant, and when the case

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was called for trial in the circuit court a motion was made to dismiss the appeal of the claimant, on the ground that there was no authority in law for the propounding of such claim in a proceeding of the kind instituted here.

Section 3080 of the Code of 1906 provides that, where a suit is brought by the seller of personal property to subject same to the debt for the purchase money thereof, the property shall be dealt with "as in the case of an attachment for debt," etc. The effect of this reference is to incorporate into section 3080, providing the procedure to be followed by a seller of personal property when undertaking to subject same to a debt for the purchase money, all the provisions of chapter 9 in relation to attachment against debtors as may be necessary to afford a complete and clear remedy to all parties interested, if such remedy is to be found in the chapter referred to. Multiplicity of suits and complicated legal proceedings are always to be avoided, if there is any remedy in the law by which same may be done. When we turn to the chapter referred to in section 3080, we find that by section 163 of that chapter it is provided that "all the provisions of law in relation to third persons claiming property levied on by virtue of *fieri facias* shall extend and apply to claimants of property levied on by virtue of attachment." Section 163 cites section 4990 in relation to the trial of right of property. In section 4990 it is provided, "when any person not a party to the execution shall claim to be the owner of or to have a lien on any personal property levied upon, such person may make affidavit to his right or title to the property," etc. It is thus seen that all of the sections of the code above quoted, in so far as same are applicable, may be used by a claimant of property, where the contest is between him and the seller thereof, in the same manner and to the same effect as if suit arose under an attachment proceeding.

We think the court erred in sustaining the motion to dismiss the appeal, and the judgment is *reversed and cause remanded.*

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Brief for appellants.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY v. BENSON B. MARTIN.

[47 South. 667; 48 South. 739.]

1. BONDS. *Railroad. Construction.*

Bonds and mortgages securing them, written in unambiguous terms, are to be construed like other writings and their meaning cannot be varied by precedent agreements between the parties.

2. SAME. *Income bonds. Priority.*

Railroad income bonds, issued without coupons attached, drawing such interest, not exceeding six per centum per annum, as the road's earnings might pay after satisfying operating expenses, interest on "such other bonds as shall from time to time be outstanding and such amounts as may be prescribed to be paid to or towards sinking funds for the redemption thereof," are subordinate to all outstanding bonds of the company and not merely to the first mortgage bonds, although a previous suit by the holders of the income bonds seeking to have them adjudged superior to all other bonds except those secured by the first mortgage was compromised by additionally securing the income bonds (without changing their terms), and indorsing that fact upon them.

FROM the chancery court of, first district, Hinds county.

HON. GARLAND G. LYELL, Chancellor.

Martin and another, appellees, were complainants in the court below; the Yazoo & Mississippi Valley Railroad Company, and others, appellants, were defendants there. From a decree favorable to the complainants, referring the cause to a master for an accounting, the defendants appealed to the supreme court.

The opinion of the court states the facts.

Mayes & Longstreet, J. M. Dickinson and *C. N. Burch,* for appellants.

The crux of this case is not in the determination of any equities peculiar to appellees, but in the determination of the respective priorities, as regards the net earnings of the rail-

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roads, of certain series of bonds and debentures: (1) the first mortgage bonds of 1886; (2) the income bonds of 1884 and supplemental mortgage; and (3) all other bonds and debentures.

The bonds all promise to pay to the bearer the sum of $1,000, fifty years after date; and then they say: "And further promises to pay the bearer hereof in the meantime annually, on the first day of November in each year, at its agency in the city of New York, on presentation of this bond for endorsement of such payment thereon, such interest on such principal sum (not exceeding, however, six per centum per annum) as the net earnings and income of said company from its railways in each current year ending on the first day of July next preceding the day above fixed for the payment of the annual interest hereon shall suffice to pay on all the bonds of this issue outstanding on such first day of July.

"After first paying from the earnings and income of said company from such railways (a) The expenses of operating said railways, and of keeping up and maintaining the same, with their appurtenances, (b) And of all improvements, additions, betterments, renewals and acquisitions, (c) And of providing and keeping up suitable equipment, (d) And the expenses of conducting said company's business affairs, and maintaining its corporate organization, (e) And after likewise paying from said earnings and income the interest payable from time to time upon such other bonds of said company or its successors as shall be from time to time outstanding, and such amounts as may be prescribed to be paid to or toward sinking funds for the redemption thereof. And if in any year the amount ascertained and determined to be applicable to the payment of such annual interest on the bonds of this issue shall not be sufficient for the full payment of interest at the rate of six per centum per annum thereon, the amount of such deficiency, whether partial or total, shall not be accumulative, nor be made up of any surplus income of subsequent years, but shall be absolutely waived, relinquished and discharged."

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Brief for appellants.

Such was the tenor of the bonds: and such is the tenor today of the bonds held by complainants, and on which they are demanding interest, not after, but before, the payment of any interest on any other bonds than the first mortgage bonds of 1884.

The supplemental bill of 1886, declared that those bonds, when stamped, conformed to the compromise and settlement of 1885, and was a fulfillment thereof, so far as the bonds are concerned. The stamp did not change the tenor of the bonds in the slightest degree. It is as follows: "We hereby further certify that this bond is further secured by a mortgage executed to us as trustees, on the 25th day of August, 1885, to which reference is hereby made for the contents and effects thereof." The endorsement so stamped declares that the bond "is further secured;" not that its terms are altered in any way. What is meant by the expression employed in such endorsement that this bond "is further secured?" Is it meant that the terms of the bond itself are so altered as that the claim of the bond as against the income and earnings is made other and different from that expressed in the bond itself, and by its own terms? Not at all. Let it be observed that these bonds are peculiar and special in their structure. The earnings and income of the railways are not pledged as security for the payment of interest. They are not pledged at all. They are not mentioned in connection with the matter of interest in any way, except by way of declaring and fixing the conditions to the payment of any interest whatever. It is the common and plain difference between the contract obligation and the security for that obligation. The promise to pay is one thing, a security for that promise is another. This bond contains a promise to pay interest on condition that the earnings and income reach a certain scale defined; but that is only the covenant to pay.

The provision, and the only provision, of the bond about security, is found in a different paragraph which is this:

"This bond is one of a series of bonds of such railway company for one thousand dollars each, numbered consecutively

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from one (1) upwards, issued and to be issued at a rate not exceeding twenty thousand dollars per mile of railroad constructed ready for operation, all of which bonds are equally secured by a certain indenture of Mortgage or Deed of Trust, bearing date the 18th day of September, one thousand eight hundred and eighty-four, executed by the said railway company to Edward H. Pardee and Albert Crolius, as trustees, conveying upon the terms and conditions therein expressed, all such lands of said railway company situated in the Counties of De Soto, Tunica, Quitman, Coahoma, Bolivar, Washington, Issaquena, Sharkey, Warren and Tate, in the state of Mississippi, are not and shall not be required for the use of said railroad company, or its successors in the construction or operation of its or their railroads or branches."

If, now, we turn to the mortgage, which the certificate, which was bargained to be endorsed on the bonds, declares to "further secure" those bonds, we find that the mortgage does not purport to alter the promise of the bonds, but only purports to give such "further security." These further securities were as follows: 1. The rents, issues and profits of the lands; 2. The rents, issues, tolls, incomes, earnings and profits of the railways; 3. Besides which, there was a new and express limitation of the total amount of income bonds, then or thereafter to be issued under the mortgage of 1884, Exhibit C, to ten millions of dollars. So far from this mortgage being intended in anywise to alter or modify the terms and conditions of the bonds themselves in respect to the payment of interest, there is inserted in it an express proviso, in which these terms and conditions are expressly and clearly insisted on. It is as follows: "Provided always, nevertheless, and these presents are upon the express condition, that if the said party of the first part, its successors or assigns, do and shall well and truly pay the principal and interest of said income bonds when and as the same shall become due and payable, in accordance with the terms and provisions and conditions thereof, then these presents and the estates, rights and in-

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terests thereby granted or conveyed shall cease and determine, and become null and void." Thus, in and by this proviso to the mortgage it is explicitly provided that, "the principal and interest of said income bonds" were to be paid, not in any new and different way, but when and as the same shall become due and payable, in accordance with the terms, provisions and conditions thereof."

Thus, the terms, provisions and conditions of the income bonds themselves, instead of being altered or modified by this mortgage, are reaffirmed; and the fulfillment of those terms, etc., exactly as they are written, vacates the mortgage by its own express proviso. Those terms were, as we have pointed out above, amongst others, that the holders of income mortgage bonds shall receive interest only, when and after "the interest payable from time to time upon such other bonds of said company or its successors as shall be from time to time outstanding," shall have been paid.

The legal construction, and the practical operation, of the supplemental mortgage of 1885, was this: First. As to the principal of the bonds, which was not due and payable until fifty years from date, the lands, their income and profits, and also the income and earnings of the road, were pledged. Whenever those bonds shall mature, then, if not paid, the income and earnings of the railways may be resorted to as security for such principal and the legal interest accruing after such maturity. Meanwhile, the income and profits of the land are simply to be turned into the purchasing fund for the nonmatured bonds (which is a different branch of this case). Secondly. But as to the interest: by the very terms of the bonds, reaffirmed by the mortgage, there is to be no payment whatever, except (if ever) in such years, during the nonmaturity of the bonds, as the company shall so prosper as that, after payment of operating expenses, after betterments, acquisitions, purchases of equipment, interest on all other bonds outstanding, and appropriations for sinking funds—if after all of this there shall be stlll, in any

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year, a residuum of the earnings and income, then such residuum shall be applicable to interest on the income bonds; and if not paid, then, but only then, the income and earnings of the road, not only for the current year, but also for any year, may be resorted to by seizure under the trust deed, to force such payment.

We repeat: it was never intended to enlarge the obligation of the bonds in respect to payment of interest; but only to give a better security, for the bonds and for such interest as might become payable in accordance with the terms and conditions of the bonds.

That this was the true idea, and is the true construction is evidenced throughout the supplemental mortgage of 1885. Not only does the proviso, quoted above in full, expressly insist on all "the terms, provisions and conditions" of the bonds, but also note the following:

1. There was a certificate to be indorsed on the bonds themselves. This certificate was agreed on. It was to be placed on bonds which on their face fixed the conditions under which interest was to be payable, those conditions being such as we have already seen. If any of those conditions was to be modified or abandoned, would not this certificate have so stated? Clearly so. But yet, it says not one word about interest payments, but only about security. This bond is further secured (not modified or altered, observe; but "secured") by a mortgage, executed," etc. 2. And so the mortgage itself, in its sixth paragraph, reads thus: "That the party of the first part ———— for the purpose of securing the due payment of the aforesaid bonds, in accordance with the terms now agreed upon as hereinbefore stated," etc. But not one word of any enlargement of the obligation of the bonds themselves. 3. And so in the habendum, it runs thus: "And for securing" (what?) "the due payment of such bonds, respectively," etc. Still no word about any interest beyond what is carried by the very terms of the bonds. 4. And so, in that part of the mortgage which directs the disposition to be made of the proceeds of mortgage

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Brief for appellants.

sales, the language of the proviso quoted above is carefully repeated. The direction is that the trustees shall apply such proceeds: "After the deductions and payments above authorized to be first made therefrom, to the payment of the principal of the said income bonds by this mortgage secured, or intended to be so, or of such of said bonds as may at that time remain outstanding and unpaid; and likewise to the payment of the interest which, according to the provisions, stipulations and conditions of said bonds, shall have accrued up to that time upon the principal of the said bonds hereby secured, and which shall remain unpaid and properly payable, with any interest accrued on such interest after default."

Thus this clear and explicit statement twice appears in the mortgage of 1885; that what interest was demandable and was secured by that supplemental mortgage, was such interest as should accrue "according to the provisions, stipulations and conditions of said bonds" themselves. There is no room left for doubt or misconstruction.

Nor can the effect of this repeated explicit statement be discounted or minified by any suggestion that such statement was improvidently made, or made by the railroad company and not fully apprehended by the other parties, etc., etc. For, in the first place, it is the clear provision of the mortgage, and it has been acted on in the commercial world as it stands, and after the lapse of twenty-three years of circulation of the various issues of bonds to many millions of amounts, it must be taken and enforced as it reads. In the second place, it was not a statement shrewdly or cunningly inserted by the railroad company, to the entrapping of Martin and his associates. This mortgage of 1885 was the outcome of litigation begun by Martin and his associates in 1883 for the assertion of their rights in the premises. One of the complainants in the litigation was N. H. Harris, and the solicitor was Alf. B. Pittman. These men were members of the bar of this court; and this court well know their full and unquestionable ability. They were two of the best

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lawyers in Mississippi; and it will be idle to talk about their not knowing what they were doing. Now after the amended bill was filed in that cause (February 17, 1885), the parties came to an agreement of compromise, in the month of July, 1885, by which all controversies were settled "in respect of the form of the bonds, and the provisions of the mortgage." This is the express statement of the supplemental bill filed in that cause on June 5, 1886, by which the final delivery of these very bonds was demanded and obtained. The execution of the mortgage of 1885 was therefore a compromise; and a compromise necessarily imports a mutual concession. Let it be noted also that three of the complainants in this supplemental bill, were Thos. C. Catchings, R. S. Buck, and H. C. McCabe—three more of the best lawyers in the state. Nor was this compromise mortgage of the one-sided devising of the railroad company. Its terms were agreed on in advance; and the agreement appears in the printed record.

When, therefore, this mortgage twice declares, in the most unequivocal terms, that the interest secured by the mortgage was such interest as should become due in accordance with the provisions, stipulations and conditions of the bonds, it must be taken that the mortgage means what it says; and also that the very able attorneys who, as owners and representatives of Martin and other interested parties agreed to it in advance and stipulated for it as written—that they also meant what it says. If not, then where is any finality to anything?

One of the most striking of the terms and provisions of the bonds (the whole terms, provisions and conditions of which were thus plainly reaffirmed by the mortgage of 1885) was that which declares that the earnings and income which should be attributable to the payment of interest, was what should be left, if any, after first paying various enumerated things, one of which was "the interest payable from time to time upon such other bonds of said company or its successors, as shall be from time to time outstanding." This clearly carried the power to

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issue other, further and subsequent series of bonds, whose interest claims should be nevertheless prior in right. But the gravamen of the present bill, and the purport of the decree appealed from, are directly in conflict with this provision of the bond. It is claimed by the appellees that this provision applied and could only apply to the interest payable on the first mortgage bonds of 1884. But clearly this is not correct.

This language of the bonds was fixed by the income bond mortgage of September 18, 1884; and the first mortgage was of the same date. Those two mortgages were contemporaneous. The first mortgage bonds were therefore of identical issues as to date and time with the income bonds—and to restrict the meaning of that phrase of the latter bonds now under discussion (*i. e.*, "upon such other bonds of said company, or its successors, as shall from time to time be outstanding") to the first mortgage bonds of 1884, is to make that phrase meaningless. For, those bonds were then and there, on that same day, issued, or provided for, by that same company. How could it be that those bonds could be issued by any successor to that company, when they were then and there issued by that company itself? The expression "or its successors" used in that connection, shows clearly that other and subsequent series, issued from time to time indefinitely, were provided for.

Important although this case is, we conceive that it will serve no useful purpose to go through the various complaints of this bill, item by item, in connection with this aspect of the controversy. The question is essentially the same, whether it arises in connection with the second mortgage of 1886, or the Yazoo & Mississippi Valley Construction Mortgage for $2,800,000, or the construction and equipment debentures of various series and dates. They are each and all provided for, as to their priority of interest charge, by those terms of complainants' bonds. Neither is it necessary to take up the assignment of errors, and discuss its items *seriatim*. The foregoing discussion is germane to all of those items from one to ten, inclusive.

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Brief for appellants.

The contention of the bill is that appellees are entitled to have their bonds now paid, either in whole or in part, out of the net proceeds of the land sales. The answer admits that such net proceeds amount to $2,363,492.49. But we deny that appellees are entitled to have their bonds now paid, either in whole or in part, out of such net proceeds, except in accordance with the terms of the mortgage of 1885. Their bonds are not due, and will not be until 1934. If they are to have any payment before maturity, such payment must be made in accordance with the contract, and not outside of it. The provision of the mortgage is as follows: "The net proceeds of such sales or disposition thereof, after payment of such amounts, shall be applied to the discharge of the said income bonds issued and secured hereunder in the following manner, viz: Whenever, and as often as, the trustees shall accumulate in their hands as much as $25,000, which the railroad company shall not require for any of the purposes mentioned in either of the two paragraphs immediately preceding, and shall, through its officers, declare to be applicable to said income bonds, the said trustees shall advertise for sealed offers thereof in some daily paper, published in the city of New York, and in one published in the city of Vicksburg, Mississippi, and in such others as may be deemed expedient, for thirty days, specifying the amount of money, subject to investment in said bonds, inviting offers, and stating the time and place of the opening of the proposals. At the appointed time such proposals only shall be received or opened as shall be accompanied by, and have filed with them, before the opening of any of the bids, the bonds offered in the sealed bid, and the bid, when opened, shall be deemed and treated as offering such bonds only as were so filed therewith before the opening of the bids, etc.

Thus, by the express provisions of the only contract which forms any basis for a claim that the bonds may or shall be discharged before their maturity, it is stipulated and agreed by the bondholders that such discharge is to be in one certain way;

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Brief for appellees.

and by that one way only; which is, that after certain preliminaries shall have been had, there shall be a competitive bidding for the money applicable, by the bondholders; and to him who shall offer his bonds at the lowest price the money shall be awarded.

Now, the bill in this case does not seek a performance of that contract. It does state that such bidding has not been had as directed by the mortgage; but while so stating, and while charging sinister and unjust plans and schemes against the railroad company in that connection, it still does not pray that the contract be performed, but prays for a departure from it. The bill does not ask for a competitive bidding, but prays for a *pro rata* distribution without any bidding. The bill does not pretend that complainants or any one else ever desired or called for such a bidding, or in any way requested of any one that it be had.

It will be observed that by the express provision of the mortgage, which even this bill does not challenge, the liability for interest on these bonds is a liability as for interest to be actually earned during each current year. It is not a general liability as in the ordinary case of interest running on a contract for borrowed money. The interest must be earned year by year; the bill alleges that such interest was in fact earned, and should have been paid, although it was not paid. So, then, the question of each year's interest is a fact to be determined by an investigation year after year of each year's business, and the striking of balance as and for each year. Each year stands to itself as a separate and distinct matter of investigation. The liability, therefore, for interest, if it exists at all, fell in at the expiration of each fiscal year, being the first day of July. And if, as to each year, the complainants waited for more than six years before filing this bill for an accounting, they are barred.

Catchings & Catchings, Alexander & Alexander, and *T. M. Miller,* for appellees.

The contention of appellants, that the language of the bond

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is an express grant of power to the railroad company to issue as many bonds or as many series of bonds as it may see proper, whenever and as often as it pleases, is erroneous. The income bonds were issued with, and as a part of the written contracts between the parties, and not for the purpose of abrogating the contracts. They were accepted, not in lieu of the bonds called for by the contracts, or in substitution for the bonds therein provided, but as being a fulfillment of the contract issued in accordance with it and in performance thereof. It must be remembered that no innocent third person's rights have intervened as to these bonds. The Illinois Central Railroad Company, through its subsidiary corporations, bought these bonds *pendente lite*. All the contracts providing for their issuance were filed as exhibits to the suit. The suit, far from being dismissed or abandoned, was, at the time of its purchase, being prosecuted with all possible vigor. The purchase by the Illinois Central Railroad Company was on June 18, 1892; the consolidation into the Yazoo & Mississippi Valley occurred October 24, 1892; and only a few weeks later leave was given to file an amended bill and orders made requiring the defendants to answer. The rights of no innocent third persons are involved. The contention is that the provision that the amount of interest payable on the bonds is ascertainable after deducting, among other things, "the interest payable from time to time upon such other bonds of said company or its successors as shall be from time to time outstanding" is in fact a contract permitting unlimited bond issues secured upon the income of the railways. It must be remembered that the road had not been built when the bonds were issued. The first mortgage bonds according to the contract, both the contracts for their issuance and the contract contained in the first mortgage itself, were not all issued and placed on the market at once. The very amount to be issued was uncertain, and depended on the mileage and cost of the railroad. They were to be issued at a certain rate per mile from time to time as the road was built. When the income bonds were prepared, no

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other bonds, except the first mortgage bonds of 1884, were in contemplation, no contingency was contemplated, or provided for under which additional bonds might be issued. It was therefore impossible in defining and limiting the promise to pay, contained in the income bonds, to specify definitely the amount of interest charged on the income which should be prior and paramount; therefore, it provided that the interest should be subordinated to the interest on such other bonds (meaning first mortgage bonds), as should be from time to time outstanding; that is, such as should have been issued from time to time under the contract providing for their issuance. The prior interest charge should not be the interest on the entire $20,500,000 of first mortgage bonds, but such of them as might lawfully have been issued and be outstanding from time to time.

No construction of language should be adopted which would make the bonds wholly valueless. A reasonable construction must be given. It would be unreasonable to hold that Martin and his associates owning these railroad corporations with their valuable franchises, assets, bounties, including the immense tracts of land, would turn them over and accept in payment a bond with the promise to pay only such sums as the company might elect to pay. It is perfectly obvious as a business proposition that no mortgage or pledge is worth anything as a security if it is expressly subordinated to any other pledges or mortgages which the debtor wishes to make at any time in the future. The court will not lightly adopt any construction of a contract that will treat it as such an absurdity from a business standpoint. The real inquiry is what bonds were meant by the words "such other bonds" as shall be "from time to time outstanding." Is this a contract that there shall be outstanding bonds charging the income? Surely that will not be contended. Is it then an express permission to pledge the income at any time unlimited in amount and unrestricted as to terms? It will be noticed that neither the income bonds nor the mortgage to secure them refer in any way expressly to the first mortgage, except where

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Brief for appellees.

the latter conveys the rents, issues, tolls, income, earnings and profits of its railways or railway lines "subject to the lien of the first mortgage of the party of the first part dated September 18, 1884." Therefore we cannot find on the face of the bonds the real contract as to the *amount* of the bonds which are to be a prior charge, but must look outside of it to the agreements, including the agreement contained in the first mortgage and the income mortgage, to find any stipulation on the subject. There is no inconsistency between the clause in the bonds providing for deduction of interest in other bonds outstanding from time to time and a contract *dehors* the bonds limiting the *amount* of such other bonds. The words "other bonds" do not mean other than the first mortgage bonds of 1884, but other than the income bonds containing the clause.

Here the bonds by express provision, stamped on them, refer to the mortgage. When we refer to it we find that language could not be used to more plainly express the intent that the whole net income is pledged for these bonds, except only that needed to pay interest on the first mortgage bonds. But appellants argue that while the income including rents (less that to pay the first mortgage bonds) is pledged by the income mortgage, this is only to secure the *principal* of the bonds, when due. Our answer to this is that this view would make the bond conflict with the mortgage. If the bonds be held to permit the income in excess of interest on the first mortgage to be applied to any unlimited amount of subsequent bonds, then how could the contemporaneous mortgage pledge such excess inviolably for even the principal of these income bonds. The argument, if we apprehend it, seems to be that the mortgage pledges such excess income, but the bond does not promise to pay it but devotes it in direct conflict with the pledge to any other bonds at the will of the company. No such construction can be tolerated. The bond must be harmonized with the mortgage securing it, and this can be done only by holding that the *amount* of other outstanding bonds conveying the income must

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be held to be fixed by the agreements and by the terms of the first and the income mortgage and that the bonds so fixed are those referred to as "other outstanding bonds," and the words "outstanding from *time* to *time*," recognize that the first mortgage bonds were to be delivered in future from time to time, and the amount outstanding at any particular time could not be definitely stated.

But the view advanced by appellants will not aid them if sustained. They, of course, do not deny that the income mortgage pledges the excess income over the interest on the first mortgage bonds, to the *principal* of the bonds. Then such excess cannot be otherwise applied. Even if not to be currently paid each year on the income bonds, such excess is an inviolable fund and cannot be paid out on subsequent bonds, but is a trust fund to be preserved and invested to meet the principal when due. The payment of it to other bonds would be enjoined. But the construction contended for does violence to the contracts, to the terms of both mortgages, to the intent of the parties as shown in the pleadings in the former suit, and presents an unbusinesslike and unworkable scheme. If such excess was not intended to be paid over each year then there would have been a provision for a sinking fund in the income mortgage, or some other provision for preserving the income so pledged. Money which is not to be paid, but to be kept undisposed of in any way, is hardly the subject of a pledge. We cannot suppose that practical business men and experienced financiers, intending to build a line of railways of indefinite length, would bind the railway company for a period of fifty years to accumulate all the income (in excess of $1,025,000) when such accumulated income would amount to far more than the debt to be then paid, and with no provision for safe-guarding or investing the fund during that long period. The corrected income mortgage of 1885 absolutely and unconditionally conveys all the *income, earnings, tolls* and *profits* without any allowance or exception for betterments, additions, extensions, etc. Suppose we should adopt appellants' ar-

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gument and contend that this grant in the mortgage cannot be limited or modified by the bond, that it stands by itself and therefore none of the income may be spent for betterments and would not the distinguished counsel for appellants meet us with the sufficiently obvious reply that the mortgage must be construed with the bond and that the bond shows what is the meaning of the words "earnings and profits." If in ascertaining the true meaning of these words we should look to the bonds can we not in ascertaining what "other bonds" outstanding mean or the amount thereof allowable, look to the contemporaneous mortgages and contracts?

To summarize on this branch of the case, we say: The bond itself expressly promises to pay to the holders annually the net income (over the amount needed to pay the interest on the first mortgage bonds) and the words "other bonds" outstanding mean other bonds of the issue of 1884. If we are mistaken in this, the corrected mortgage of 1885 unequivocally conveys such income to pay the interest on the income bonds. If mistaken in both of these views, the income mortgage of 1885 certainly conveys all such excess income to pay the *principal* of the income bonds and any past or future appropriation of such income to subsequent issues of bonds or script is and will be a clear violation of the contract rights of the income bondholders and will be enjoined.

The disposition of the proceeds of the lands has from the first been in flagrant disregard of the rights of these complainants. From the very outset the distinct understanding was that the lands should be a special security solely for the income bonds. These lands, together with a few miles of completed railroad, composed the valuable physical properties owned by Martin and his associates. They had a value independent of the franchise of the railroad, and we find that the first completed agreement provided that the income bonds should be secured by a first mortgage on all the lands, but with a very necessary proviso that the lands might be sold upon the condition "that the

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proceeds of such sales or dispositions thereof shall be applied to the discharge of such income bonds or shall be held in trust by or under the directions of the trustee of such mortgage, as security for the outstanding income bonds secured thereby." It will be noted that this does not stipulate that the proceeds shall be applied only to the principal of the bonds, but as there was an enormous acreage of these lands, and they were prospectively very valuable it was supposed that the proceeds thereof would go very far towards paying these income bonds, and it was further contemplated that accrued interest was to be paid.

So jealous were Martin and his associates of their right to have the proceeds of these lands appropriated, as they were sold, to pay the income bonds that the mortgage provided for a system of bidding for the purpose of retiring the bonds as often as the sum of $25,000 should accummulate in their hands. There was no discretion given to the trustees in regard to thus retiring the bonds. It was, however, made a prerequisite that the officers of the Louisiana, New Orleans & Texas Railroad Company should declare the amount accummulated to be applicable to the income bonds. Upon such declaration being made, the trustees were required to advertise for offers to retire the bonds. It is obvious from the contracts, the face of the mortgage, and the admitted facts that this enormous fund, between two and three millions of dollars, cannot either legally or equitably be withheld from the bondholders.

It is to be noted that the Yazoo & Mississippi Valley Railroad Company is not a "successor" of the Louisville, New Orleans & Texas Railroad Company, within the meaning of that word as used in the bonds. By no just reasoning can it be said that when the bonds were issued anything more could have been looked for or contemplated than the issuance of such further bonds by the Louisville, New Orleans & Texas Railroad Company as might be necessary to make the railroad enterprise undertaken by it effective. It could not have been contemplated that this railroad company would become consolidated with another company

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engaged in a different railroad enterprsie, and that this consolidated company should have the right to issue bonds to make effective this additional railroad enterprise, which should be prior to the right of the holders of the income bonds in question to receive interest.

CAMPBELL,* Special Judge, delivered the opinion of the court.

In the year 1882 E. Martin, with associates, was a promoter of the important enterprise to construct a railroad from Memphis, Tenn., to New Orleans, La., through the state of Mississippi, and had obtained control of several charters which had been granted by the states named looking to the construction of a railway over the route, as well as of sundry assets of companies which had been organized under those charters. In that year he made a contract with one Johnston to construct the road and transferred to him all his rights under the several charters mentioned with the assets of the several companies including seven hundred and thirty-four thousand acres of land in the Mississippi Delta for $394,000 paid and other benefits promised as set forth in a written agreement between the parties. Other parties were interested with Johnston. The plan contemplated for the construction of the railroad was to form a new company by consolidation of different existing ones. The parties engaged in the enterprise proceeded to the execution of the plan by agreeing upon consolidation of several companies and the name of the new company and preparing two classes of bonds for it, one being first mortgage bonds with interest coupons and secured by a first mortgage on the railway, its income and earnings to the length of eight hundred miles, the bonds to mature in fifty years, the interest at five per cent. payable semi-annually. The others were called income bonds payable at the expiration of

* WHITFIELD, C. J., being related to one of the parties, recused himself in this case and J. A. P. Campbell, Esq., a member of the supreme court bar was appointed and presided on the trial of this cause in his place.

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fifty years, without coupons, each for $1,000, with such interest on such principal sum (not exceeding, however, six per centum per annum), as the net earnings and income of said railway company from its railways in each current year ending on the 1st day of July next preceding the day above fixed for the payment of the annual interest hereon shall suffice to pay upon all the bonds of this issue outstanding on such 1st day of July, after first paying from the earnings and income of said company from such railways the expenses of operating said railways, and of keeping up and maintaining the same, with their appurtenances, and of all improvements, additions, betterments, renewals, and acquisitions, and of providing and keeping up suitable equipment, and the expenses of conducting said company's business and affairs, and maintaining its corporate organization, and after likewise paying from said earnings and income the interest payable from time to time upon such other bonds of said company or its successors as shall be from time to time outstanding, and such amounts as may be prescribed to be paid to or towards sinking funds for the redemption thereof. And, if, in any year, the amount as ascertained and determined to be applicable to the payment of such annual interest on the bonds of this issue shall not be sufficient for the full payment of interest at the rate of six per centum per annum, the amount of such deficiency, whether partial or total, shall not be accumulative, or be made up out of any surplus income of subsequent years, but shall be absolutely waived, relinquished, and discharged. The mortgage or deed of trust which secured the income bonds conveyed to trustees all the lands in the Mississippi Delta which had been conveyed by Martin not required in the construction or operation of the railroad or branches, but conveyed nothing else for the security of the bonds.

At this stage of the proceeding, on September 15, 1883, Martin and others exhibited a bill in the chancery court of Warren county complaining of violation of contract, and prayed and obtained an injunction against carrying out the plan of consolida-

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tion described above. The case was removed to the United States court at Jackson, Miss. On the 17th of February, 1885, an amended bill was exhibited by the complainants charging that in disregard of the injunction the defendants had consolidated into the Louisville, New Orleans & Texas Railroad Company, and on the 18th of September, 1884, had executed and delivered to different parties many millions of dollars of bonds to be followed by others and certificates of stock, and had executed a mortgage to secure the bonds, and also a deed of trust for income bonds and delivered a large amount of these to certain persons, all in violation of the agreement between the parties of 6th of August, 1884. Many violations of the agreement were set forth in the bill, and the language of the income bonds was set forth as copied above. It was averred by the amendment that the complainants were entitled to bonds with interest not exceeding six per cent. per annum out of the income of the company not limited to the income of its railway, and especially were they entitled to the income from rents, issues, and profits of the lands of the company, and that they were entitled to bonds, the interest and principal of which should be secured by mortgage next to the first mortgage, and yet, by the terms of the income bonds, the net income pledged for the payment of the interest may be devoted first to the payment of interest of such other bonds of said company or its successors as shall from time to time be outstanding; and, further, that "it should have been limited to payment of interest of the first mortgage bonds as the only bonds secured by a mortgage paramount to the income bonds," and a further objection urged was that there should not be a provision for a sinking fund for the payment of the principal of the first mortgage bonds. Violation of the injunction was charged, and defendants were cited to appear at the May term, 1885, of the court to answer for contempt. By agreement the time for defendant to answer the amendment and the charge of contempt was extended to the first Monday of September, 1885, and it was further agreed that a new mortgage

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or deed of trust for the security of the income bonds should be executed by the Louisville, New Orleans & Texas Railroad Company, the form of which was given, and it was stipulated that the income bonds already in existence (should not be changed) should each be stamped with words: "We hereby further certify that this bond is further secured by a mortgage executed to us as trustees on the —— day of August, 1885, to which reference is hereby made for the contents and effect thereof." New bonds were not to be executed. They were to remain as they had been drawn. The new provisions to be put in the new mortgage or deed of trust for the security of the income bonds were (additional to the Delta lands which were conveyed by the first mortgage to secure income bonds): "The rents, issues and profits of the land, and, subject to the lien of the first mortgage of the company of September 18, 1884, all the rents, issues, tolls, income, earnings and profits of its railways or railway lines which the said party of the first part now possesses or is entitled to or may become possessed of or entitled to." And the trustees were to give bond with security in the sum of $50,000 conditioned for faithful performance of duty. And the mortgage was to contain the following provision for the application of the net proceeds of the sale of the lands conveyed by it, viz.:

"Third. The net proceeds of such sales or disposition thereof, after payment of such amount, shall be applied to the discharge of the said income bonds issued and secured hereunder in the following manner, viz.: Whenever, and as often as the trustees shall accumulate in their hands as much as $25,000, which the railroad company shall not require for any of the purposes mentioned in either of the two paragraphs immediately preceding, and shall, through its officers, declare to be applicable to the income bonds, the trustees shall advertise for sealed offers thereof in some daily paper, published in the city of New York, and in one published in the city of Vicksburg, Mississippi, and in others as may be deemed expedient, for thirty days, specify-

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ing the amount of money subject to investment in said bonds, inviting offers, and stating the time and place of the opening of the proposals. At the appointed time, such proposals only shall be received or opened as shall be accompanied by, and have filed with them before the opening of any of the bids, the bonds offered in the sealed bid, and the bids, when opened, shall be deemed and treated as offering such bonds only as were so filed therewith before the opening of the bids. All such sealed offers as are received and accepted as such shall be registered before the opening of any bids, and none of them or the bonds therewith shall be thereafter withdrawn from the competition. The opening of the bids shall be done by the trustees in the presence of all bidders or their representatives, who may be present, who shall have the right to inspect the same. The bids shall be registered as they are opened and a record of the bidder made. The serial number of bonds offered and the prices for which they are offered shall be made and kept, subject to the inspection of income bondholders. In case two or more of the lowest offers are at the same rate, their bonds shall be taken in stock due to E. Martin and associates, other than Harris and equal numbers, etc. And it is hereby further provided, declared, granted, and agreed that in case default shall be made in the payment of the principal of said bonds hereby secured, or of any such bonds, when such principal shall be due and payable, then and in that event the said parties of the second part, or their successors in the trust, shall be entitled to, and may, upon the requisition in writing to that effect of holders of a majority of such income bonds hereby secured, and upon being duly and properly indemnified by such bondholders against expense or loss in the premises shall either personally or by agent or attorney, enter into and upon such part of the said mortgaged premises as shall then remain subject to the lien and operation of this indenture or mortgage, shall have, hold, and possess the same, with the rights and privileges thereunto appertaining."

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Opinion of the court.

The record shows that the new and supplemental mortgage or deed of trust, as agreed on, was duly executed, and the income bonds were duly stamped as agreed, and that the bonds and stock due to E. Martin and associates, other than Harris and Klein (which were in litigation), had been properly executed and delivered to the parties entitled. They are not parties to this suit. The bonds and stock due to Harris were involved in litigation which delayed their delivery until a recent date when they were delivered in pursuance of a decree of the federal court mentioned above which ordered their delivery by parties other than the appellants in this case.

This suit was brought by B. B. Martin and B. W. Griffith, assignees of the bonds and stock due to Harris, being bonds to amount of $95,500 and stock to amount of $47,900. The claim of complainants is that the income bonds held by them have been improperly subordinated to bonds of the obligor other than their first mortgage bonds, and that the proceeds of the sale of the lands mortgaged to secure the income bonds have not been properly dealt with, but have been diverted from their proper application. Wherefore they seek relief prayed in their bill. As stated by counsel for the appellees, "the principal controversy is as to the right to the net income of the railway as between the different series of bonds." The other question is as to the proceeds of the sale of the seven hundred thirty-four thousand acres of land, all of which have been sold except a few hundred acres, and the net proceeds of which are admitted to be several millions of dollars, and also admitted by the appellants to be appropriable to the income bonds in accordance with the terms of the mortgage securing them. We will now consider these matters.

It seems to us very clear that the income bonds by their express terms are subordinate to all such bonds of the railway company as were issued from time to time and be outstanding. This is the plain stipulation of the income bonds as understood and agreed on in the final settlement between the parties when

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all their differences and controversies were ended in 1885; for, as stated above, one of the objections urged by the amended bill of the complainants in the federal court on the 17th of February, 1885, was that the income bonds as drawn were by their terms made subordinate to all outstanding bonds of the company, whereas, it was averred, they should come next to the first mortgage bonds. That was undoubtedly a correct interpretation of the bonds, was well understood and urged as a just objection to them, an yet, while the new and supplemental mortgage or deed of trust for the security of these very bonds was made to contain new and important provisions for their security, the bonds remained unchanged in a single particular, remained and were accepted in the very words they contained at first, but were stamped on the back with the words: "We hereby certify that this bond is further secured by a mortgage executed," etc., as shown above, and the supplemental mortgage by which they were further secured did not change a single word of the bonds in the terms or effect. No provision of the supplemental mortgage for their security varies in the slightest particular the words of the income bonds. It is neither necessary nor proper to look to precedent agreements of parties to ascertain the meaning of the bonds, and the instrument to secure them. There is nothing ambiguous, doubtful, or uncertain as to their meaning. It is as plain and clear as language can make it. All precedent contracts were merged in the final settlement which terminated all controversies, and fixed the rights of parties. Nor does it seem marvelous to us that such a settlement should have been made at the time. The railroad had not been built and equipped then. The outcome of the great enterprise could not be foreseen. It was known that the cost would be great and issuance of bonds for construction and equipment was expected. Hence recognition in the income bonds of the right to issue bonds other than the first mortgage bonds to all which the interest of the income bonds should be subordinate. Besides, the lands were looked to and relied on for the retirement

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Suggestion of error.

of the income bonds and probably were expected to be sufficient for that. Be this as it may, there is no escape from the plain provisions of the bonds and mortgage which stand as the sole exposition of the right of parties. It is only the interest on these bonds which was by their terms contingent and problematical. The principal is absolutely unconditional. A manifest distinction is made throughout the bonds and deed of trust between the principal and the interest of the bonds. It was only on default as to principal that the trustees were empowered to proceed under the deed of trust, and it is obvious that the interest was risked on the success of the enterprise known to be full of hazard. The net proceeds of the lands conveyed are appropriable according to the provision of the mortgage or deed of trust conveying them—*i. e.*, holders are entitled to competitive bidding as provided for—and we do not see any difficulty in the way of carrying on the scheme provided by the instrument securing them. If it shall be made to appear that the contingency on which the accrual of interest was made to depend has happened, the interest is recoverable. Until then no interest can be due.

We deem it unnecessary to decide any other question, and it follows from the foregoing views that the decree appealed from must be reversed, and the cause remanded to the chancery court, where such further proceedings may be had as may be in conformity to this opinion. Ordered accordingly.

Reversed.

After the rendition of the foregoing opinion *Catchings & Catchings, Alexander & Alexander* and *T. M. Miller,* for appellees, submitted a suggestion of error, setting forth:

1. There is nothing in the record to warrant the assumption by the court that the lands were "probably expected to be sufficient for the retirement of the income bonds." On the contrary, appellees insist that every indication furnished by the record shows conclusively that the lands were not probably expected to be sufficient for that purpose.

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Suggestion of error.

2. The court, in its opinion, erred in surmising that Martin and his associates, appellees, consented that the income bonds of 1885, in so far as the payment of interest was concerned, should be subordinated to any and all bonds which might at any time be issued, because they knew that the enterprise was full of hazard. The record does not justify such surmise.

3. The court, in its opinion, erred, in holding it to be a clear proposition that "the income bonds by their express terms are subordinate to all such bonds of the company as were issued from time to time and might be outstanding." There is no authority for interpolating these words into the bonds:" "were issued from time to time." The difference between these words and the real language of the bonds, to wit: "as shall be from time to time outstanding," is wide and deep.

4. The mortgage of September 18, 1884, securing these income bonds, did not convey the rents and income of the railway lines at all. As a result of the controversy raised by the amended bill of complaint, it was provided in the supplemental mortgage of 1885 that there should be a lien to secure the interest on the income bonds upon the rents and income, and for that purpose the rents and income were conveyed subject only to the lien of the first mortgage. The words, "subject to the lien of the first mortgage," ought to be given that significance; and the court does violence to the plain and simple English language when it refuses to do so.

5. The court, in its opinion, did not respond to appellees' contention that the bonds do not contain or purport to contain a grant of power to issue an unlimited amount of bonds.

6. The opinion of the court, unless modified, will require the subordination of the income bonds to all other bonds which have been or may be issued, regardless of the purposes for which issued.

7. In the phrase, "such other bonds of said company or its successors as shall be from time to time outstanding," the words, "such other bonds," clearly refer to the first mortgage bonds only.

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Opinion of the court.

CAMPBELL, Special Judge, delivered the opinion of the court in response to the suggestion of error.

Duly appreciating the sincerity and earnestness of counsel and the importance of this case, we have laboriously reconsidered it in all its features, aided by the criticism of our opinion in the suggestion of error and the former arguments of counsel. The mistake made by counsel, as we think, is in assuming that there was a limit to the mileage of railway the company might build or acquire, or the amount of bonds it might issue. There is no warrant for this in the mortgages or bonds, or in the precedent agreement of parties. By the contract of April 26, 1882, between Johnston and Martin, there was a stipulation as to what each was to get out of the enterprise of five hundred miles of railway, and by that of August 6, 1884, they provided for three companies named to consolidate and execute first mortgage bonds at the rate of $30,000 per mile, secured by a first mortgage on the railroad, etc., "whether already acquired or hereafter to be acquired," and "nonaccumulative income bonds" at the rate of $20,000 a mile, to be secured by a first mortgage on lands. Not a word is said about miles of railway which may be built or acquired, but it is stipulated that Johnston shall have first mortgage bonds to the amount of $24,000 a mile and an additional amount, not specified, rated at seventy-five cents on the dollar. "The balance of the first mortgage bonds shall remain the property of the consolidated company, and to be used for its benefit," is a clause of this agreement. "Capital stock of said consolidated company at and after the rate of $10,000 per mile" was provided for by this agreement, all of which was to be delivered to Johnston, who was immediately to deliver to Martin and appointees income bonds to the amount of (at their face value) $1,066,666.17 and capital stock to amount of $533,333.34. This agreement was declared by it to be "in full compromise, settlement, satisfaction, and discharge of all claims and demands," except, etc., under two former agreements mentioned, and suits which each party had instituted

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against the other were to be dismissed, injunctions were to be modified, etc. This was a most important contract, and yet nowhere in it is there any suggestion of any limitation of miles of railroad which might be built or purchased or of bonds that might be issued or mortgages that could be issued to secure them.

The provision of this contract that the less than one-sixth part of the first mortgage bonds not to be Johnston's were to remain the property of the company, cited by counsel as supporting their view, in our view, has no such effect. It simply declares that what does not go to Johnston shall be the company's. This contract led to the consolidation of four companies into the Louisville, New Orleans & Texas Company and execution by it of first mortgage bonds to amount of $20,550,000, payable after fifty years, with five per cent. interest per annum, payable semi-annually, and a mortgage on the railway of the Louisville, New Orleans & Texas Company, and its successors, constructed or to be constructed, until the length of such constructed railways shall amount in the aggregate to eight hundred miles, etc. The bonds issued were to be authenticated as provided for and delivered to the company at the rate of $30,000 for each mile of main line of railway constructed, and $20,000 for each mile of branch railway, etc., until eight hundred miles were reached, which was the extent provided for by the mortgage. The first mortgage for securing the income bonds was on lands described therein only, and for bonds at the rate of $20,000 a mile of railroad ready for operation, with no limit as to the number of miles. This has the same date as the first mortgage for $20,550,000. The second mortgage for securing income bonds (which was the result of the amended bill of Martin *et al.*), executed in 1885, conveyed the lands conveyed by the former mortgage for the income bonds, and their rents, issues, and profits, and also, subject to the lien of the first mortgage (for the $20,550,000 of bonds), all incomes of the railways which the company had or might acquire. This supplemental income

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bond mortgage is made a security for $10,000,000 of bonds, a fixed amount, which was not the case in the first mortgage for income bonds. Its provision that no more than $10,000,000 of bonds shall be issued thereunder, referring to the first mortgage for income bonds, "and none other shall participate in the benefits or security thereof," means no more than that the mortgage is a security for them alone, and that no others can share in it, just as the limitation in the mortgage for the $20,550,000 is as to the amount of bonds for which it is a security, and not a limitation of the right of the company to issue other bonds and secure them by other mortgages.

No other bonds can participate in that particular security, but the right to issue other bonds and secure them by other mortgages is in no manner affected. It is thus manifest that there is not, in precedent agreements or in the mortgages executed to secure bonds, any warrant for the claim made that any limit was placed on the right of the company to construct railways, or buy railways, and issue bonds, and secure them by mortgages subordinate to those issued, and all contentions based on the assumption that there was a limitation as to mileage or bonds are unsound. If there had been a limit as to mileage, it could not control the express language of the bonds. It is quite likely that in 1884 the contemplation was that eight hundred miles would be about the length of the railway, just as in 1882, five hundred miles were contemplated; but, as there was no limitation of mileage in 1882, there was none in 1884 or 1885. Since the view grew three hundred miles in two years, a greater expansion of this great and growing enterprise might well have been thought of. Certainly there was no limit prescribed by any instrument shown by the record of this case to the growth of this railroad and its branches. The mortgage for $20,550,000 of bonds and the mortgage of the same date for security of income bonds are independent instruments, each for the security of different bonds and conveying different property, and neither refers to the other, and the mortgage of 1885, supplemental to

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that of 1884 for income bonds, adds security for the income bonds, and provides a scheme for their retirement from time to time by competitive bidding for money from sales of land; but it makes no reference to the mortgage for $20,550,000 of bonds, except to convey income of the railways subject to that mortgage. Counsel say this made the second mortgage for income bond subject only to the lien of the first mortgage, and that the words "subject to the lien of the first mortgage" ought to be given that significance, etc. That is precisely the significance we give these words of "plain and simple English." The mortgage of 1885 containing these words is "subject to the lien of the first mortgage," and subject to it only, a security for the income bonds, and for them only, and no other bonds can participate in that security.

The suggestion that we have held any other view is unwarranted, and we fail to see how such misconception could arise. But we fail to see what that has to do with the question as to the legal import of the terms of the income bonds as to interest on them. That the mortgage for their security is made subject to another mortgage throws no light on the terms of the bonds. It simply affects the security for them, and in no way aids the intrepretation of their terms. The bonds are one thing; the security for them, another thing. What the bonds mean is one thing, and what the mortgage to secure them binds is another thing. It secures the bonds according to their tenor and its legal effect. The question in this case is as to the meaning of the income bonds, as to interest on them, with reference to other bonds. There is no question about the security for them; but what bonds are entitled to have their interest paid before any shall accrue on income bonds? is the question. We fail to perceive any force in the arguments, drawn from the provisions of the different mortgages, as to the meaning of the income bonds in their stipulation for interest after "first paying [many items and] the interest payable from time to time upon such other bonds of said company or its successors as shall be from time

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to time outstanding." The meaning of this provision is determinable alone by the terms of it. No light is furnished for its solution by anything in the mortgage.

What does the expression, "such other bonds of said company or its successors as shall be from time to time outstanding," mean? We are charged with interpolating, because of the use of the expression "issued from time to time," and are informed that there is "wide and deep" difference. We had supposed that a bond had to be issued before it could be outstanding, and that, if retired, it would not be outstanding; and we are of that opinion still. It is argued as if we found the right of the company to issue bonds in the terms of the bonds. This is unfounded. The power to issue bonds is not derived from the income bonds, and no such an idea is deducible from anything we have said; but as the question is, What claim to interest have the income bonds? it must be answered by their terms. They determine what may be claimed for them. Were a suit brought on the bonds, the question would not be as to their security, but as to their terms, unless the suit was to enforce the security for them, and in that case it would be enforced for them according to their terms. If their interest was absolute, it would be recovered; but, as it is contingent, in order to recover interest, it would be necessary to show that the contingency had occurred before its recovery could be had.

We have no guide to the meaning of the bonds except their language. All else is mere conjecture. Their language is plain, simple, and unambiguous. Interest on them is not payable until interest on "such other bonds of said company or its successors as shall be from time to time outstanding"—*i. e.*, issued from time to time and not retired—shall be paid. Counsel say that "such other bonds" are the first mortgage bonds; but the income bonds do not say that. They say, "such other bonds"—*i. e.*, all other, any other, bonds of the company or its successors. To limit that expression to first mortgage bonds is to deprive them of their full significance by interpolating.

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If they had reference to the first mortgage bonds, or any other particular bonds, it may be justly supposed they would have been so worded. Besides, they were understood in 1885 to mean just what we say they mean, and were issued and accepted with that interpretation. It is not true that we based our view of them upon that urged by the amended bill set forth in our opinion; but we cited it to show the understanding of them before their issuance. No other view is maintainable; for no other is natural, lying on the surface, and giving full significance to bonds and mortgages. Whatever may have been thought or understood, the language employed is the only safe guide. All else is conjecture. We find what is to us a very reasonable explanation of the satisfaction of parties with the income bonds because of the greatly increased security for them by the supplemental mortgage of 1885; but our opinion is independent of that, and rests on the fact that no other view satisfies the language of the income bonds, and it must have its full meaning. The mortgage for the income bonds must have its full effect. It secures the $10,000,000 of income bonds, and no others; and none can share with them in this security, but it secures them according to their tenor.

The effort of learned counsel to maintain their contention that the other bonds referred to by the income bonds are the first mortgage bonds, and no other, is contradictory, and demonstrates its unsoundness. In one part of the suggestion of error they affirm that the reason for the provision "from time to time outstanding" was "intended to subordinate the income bonds to the first mortgage bonds to an amount not exceeding $20,550,000, whether actually issued and outstanding or not." Again they say: "These bonds [the first mortgage bonds] were to be issued as needed, and not all at once. Hence it necessarily followed that all these bonds were not to be treated as being prior to the income bonds, when it came to be ascertained whether interest on the latter had been earned or not, but that only such of them should be so considered as might be from time

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to time outstanding." Such are the difficulties in which learned counsel, deceived by their ingenuity, are involved in an effort to account for the language of the income bonds.

The suggestion of counsel that we overlooked the first mortgage for income bonds is a misapprehension. So far from overlooking it, it was an influential factor in our conclusion. It is entirely independent of the first mortgage, makes no reference to it, is for a different class of bond, and conveys different property. It is to be considered by itself, and has no bearing on the question involved, which is not as to the meaning of any of the mortgages, but what is the meaning of the income bonds as to interest? We have overlooked nothing. It is true that we did not respond specifically to the oral argument claiming that the Yazoo & Mississippi Valley Company is not the successor of the Louisville, New Orleans & Texas Company, and we assumed that it is, because it is proceeded against as such in this suit, is sought to be held liable as such, and is described as such by the bill, and repeatedly so called in the brief of counsel for the appellees, and correctly, as we think. It certainly succeeded to all the belongings and obligations of the Louisville, New Orleans & Texas Company, and is its successor, and as such had the right to carry out and extend and complete the scheme of its predecessor as to the railways obtained from it. The Louisville, New Orleans & Texas Company ceased to be, and the Yazoo & Mississippi Valley Company took its place. There is now but one company, the Yazoo & Mississippi Valley Company. The company spoken of in our opinion, whose bonds, issued and outstanding, are entitled to precedence as to interest to that of the income bonds, is the Louisville, New Orleans & Texas Company, or its successor, the Yazoo & Mississippi Valley Company, and the bonds are such as were properly issued in the prosecution of the railroad scheme in which the Louisville, New Orleans & Texas Company was engaged. Our opinion admits of no such interpretation as to include bonds other than such as were or may be properly issued on account of the railways.

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We did not and do not particularize the bonds entitled to precedence over the income bonds as to interest, leaving that for inquiry and decision in the future progress of the case. The Louisville, New Orleans & Texas Company had the right to acquire branches, feeders to the main line, and to issue bonds and give mortgages, and its right passed to the Yazoo & Mississippi Valley Company, its successor, which had the right it had as to its railways. The scheme of the Louisville, New Orleans & Texas Company was to possess the country east of the Mississippi river by a main line of railway from Memphis, Tenn., to New Orleans, La., with branches of indefinite length through an alluvial country largely undeveloped, liable to destructive overflows from the river, but a few years after the wreck and ruin of war and reconstruction, when the levee system was incomplete, and times were hard and money scarce, and the future seemed uncertain, and great public enterprizes full of hazard. Bonds were relied on to furnish the money for the great enterprise. The first mortgage bonds, secured by eight hundred miles of the railway, its income, and its equipments and appurtenances, bearing five per cent. interest per annum, payable semi-annually, having fifty years to run, were rated at seventy-five cents on the dollar in dealings between the promoters. Income bonds to amount of $10,000,000 were provided for, payable in fifty years, and with interest not to exceed six per cent. per annum, and that so contingent as to be very uncertain and hardly a factor in estimating value. In preparing these income bonds it is evident that the idea of future need for more money to be raised by more bonds was present, and that the interest on the income bonds was made contingent on various items, and among them the interest on "such other bonds of said company or its successors as shall be from time to time outstanding," thus providing a basis for credit for such bonds as should be found necessary in the future in the growth and maintenance of the enterprise. The security for the income bonds by the first mortgage for

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them was only lands in several delta counties, supplemented by a new mortgage of these lands and their issues and profits, and subject to the first mortgage for $20,550,000 of bonds, the income of the entire railway, possessed or to be possessed, and a scheme for competitive bidding as often as $25,000 were appropriable for the purpose from sales of the lands mortgaged, whereby it was probably expected that a large part, if not all, of the bonds would be retired long before maturity. The value of the lands mortgaged was expected to increase rapidly with the development of the country by the railroad, and the expectation of rapid retirement of the income bonds was not unfounded. This great railroad company, formed of four separate roads by consolidation, was continually looking to and providing for the future, and in the various instruments executed by it used the terms "successors and assigns," as if contemplating such and providing for them, and it is inconceivable that the terms employed in the income bonds as to interest could have any other meaning attached than that which we give them.

What counsel call our "surmises" are our deductions from the record. Counsel indulge in various surmises deduced from from the record, which differ from ours because of the different perspective of court and counsel, as may be supposed. Eliminate all speculation and surmises as to why the particular language of the income bonds was employed, there it stands as written and unchanged, after it had been specifically objected to by the amended bill on the ground that it meant just what we say it means, and new and increased security for them as written and thus interpreted was accepted, and these bonds and capital stock to the sum of about a million dollars of bonds and half a million dollars of stock were issued and accepted without the change of a word in the bonds or any complaint of an erroneous interpretation of them, so far as we know, until this suit. With the history of these bonds contained in the record, it is incredible that their meaning as we declare it was not well understood by all dealing with them. Anyway they stand as the

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Syllabus.

sole exposition of their meaning. The fact that the Louisville, New Orleans & Texas Company may not have had express grant of authority to consolidate, gives no aid to the interpretation of the language of the income bonds. We find no warrant for limiting bonds which might be issued to bear interest payable before any on income bonds to those issued only for construction.

In the present state of the case we are not willing to grant the injunction asked for. All proper process may be obtained in the chancery court. Surely no one could have understood us to declare anything more, with reference to competitive bidding by holders of income bonds, than that, since delay had occurred for reasons shown, the scheme provided by the mortgage of 1885 may now be carried out as to the whole fund derived from sales of the lands.

Our decision as heretofore made will stand, with this explanation of our views as set forth in our former opinion.

Suggestion of error overruled.

JOHN H. LONG v. ROBERT B. MAYES ET AL.

[48 South. 523.]

1. WILLS. *Construction. Priorities of right.*

Where a will charged testator's estate with the support of his widow, one son and two daughters during the lives of the widow and son and celibacy of the daughters, but provided that after the widow's death, and when the number of those to be supported should not exceed two, if the condition of the estate and the objects to be secured would justify it without trenching on the support of the party or parties entitled thereto, the property should be divided among all of testator's surviving children or their descendants, and on the death of the last survivor of those entitled to support a further division should be made, the right to a preliminary partition was subordinate to the claim for main-

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Brief of appellants.

tenance and could not be granted if the income from the estate was only sufficient to pay it and preserve the property.

2. SAME. *"Home."*

A provision in a will that beneficiaries shall be provided with a home, includes everything necessary to maintain the home, such as paying taxes and keeping it in proper repair, but not living expenses involved in the purchasing of supplies.

3. SAME. *Allowance to beneficiaries.*

Whether a sum allowed by the court for support of beneficiaries can be increased or diminished, or ought to be, and when a division of the property can be made under the will, being matters for future consideration, an order fixing the allowance for the beneficiaries' support is properly made subject to future modification.

FROM the chancery court of Copiah county.

HON. G. GARLAND LYELL, Chancellor.

Robert B. Mayes, son of the testator, one of the appellees and cross-appellant, was complainant in the court below; the other legatees and devisees (Long, appellant, being the guardian *ad litem* for the infants) were defendants there. The object of the proceedings was to obtain a judicial construction of the last will and testament of the late Herman B. Mayes, deceased.

From a decree, quoted in full in the opinion of the court, the infant defendants, by Long their guardian *ad litem,* appealed to the supreme court, the adult defendants not joining therein, and Robert B. Mayes, complainant, prosecuted a cross-appeal.

The facts are fully stated in the opinion of the court.

Robert B. Ricketts, for appellants.

There is no dispute about the facts in this case nor is there any contest over the action of the court below in making the decree which subjected the lands, the title to which was held by the petitioner as trustee, to the provisions of the will of the decedent, the former owner of them. In fact the petition contains a full statement of the facts of the case.

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Brief for appellees.

Oral testimony was taken on the trial of the cause and the sole point upon which there was conflict of testimony was as to the amount necessary and proper to be set apart out of the income from the estate for the support of William W. Mayes and Miss Alice Mayes. It is respectfully submitted to the court that upon the undisputed facts of this case and upon the showing made as to the probable net income from the estate it was error for the court below to impose upon the estate such large payments to these beneficiaries. It would seem that under the present circumstances, at least, with both of the beneficiaries making the same place their home and with the income for both of them subject, as to expenditure, to the direction of one beneficiary the sum of $125.00 per month is rather a large support for two people. It will be noted that under section four of the decree the trustee of the estate is also directed to provide a home for the two beneficiaries, not charging the necessary expense of maintaining such home against them or deducting it from their income. It is, therefore, urged that the provisions made for the two beneficiaries is excessive and is not justified by the directions for their support as the same appear in *Item Two* and *Item Three* of the will. A construction by this court of these items of the will is desired for the reason that the shares of the infants, represented by Long, in the final distribution of the estate might be greatly reduced by following out the directions of the fourth section of the decree.

Since the rights of infants are involved and since the rules established by the action of this court may have to stand for many years for the guidance of the trustee it is desired that the facts of this cause be set out in connection with the opinion of this court.

Harris & Willing, for appellees.

The title to a considerable portion of the property belonging to the estate of Herman B. Mayes, deceased, had become vested in Robert B. Mayes, who at all times held it in trust for the es-

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Brief for appellees.

tate, and subordinate to the provisions of his father's will, he faithfully accounting to the estate for the proceeds of everything that came into his hands, without charging anything for his services in connection therewith.

In the petition for the construction of the will, filed by Robert B. Mayes, the facts were substantially set out.

The object of Robert B. Mayes in filling the petition was to carry out the exact provisions of his father's will by revesting the title in the trustee, and to have judicially declared what would be a comfortable support for the surviving beneficiaries in the will and to have the will of his father judicially interpreted.

It is perfectly manifest that the testator charged his entire estate with the comfortable support and maintenance of the beneficiaries mentioned therein, and that was the paramount purpose of the testator. In item two of the will, it is provided that the property and estate devised and bequeathed stand charged, as well as the body of the income thereof, permanently, with whatever sum might be necessary for the comfortable support and maintenance of the beneficiaries named therein, and to remain thus charged to the measure and extent of such comfortable support and maintenance for them and each of them and the survivors of them. It is true that the number of beneficiaries has been reduced by the death of Mrs. Charity Mayes and the marriage of Miss Mary Jane Mayes; but it is perfectly manifest from the testimony that the condition of the estate, and the objects declared in the second item of the will, will not justify any division of the property now on hand, without trenching on the comfortable support and maintenance of the surviving beneficiaries. Item third of the will expressly provided as follows:

"It being my will to postpone any division of my estate, until the objects set forth in said item two of this will shall have been secured."

The court below did not err in fixing the amount decreed for

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Brief of appellees.

the annual support of the beneficiaries. It is manifest from the testimony that seventy-five dollars a month for Miss Alice Mayes and fifty dollars a month for William W. Mayes is necessary for their comfortable support and maintenance. These sums are not unnecessarily large, and do not place too heavy a charge upon the estate. By prudent management, the estate can be made to yield no more than enough to pay taxes, fixed charges, and these sums.

A young lady who moves in the circles in which Miss Alice Mayes lives cannot live in comfort on less than seventy-five dollars a month, nor can William W. Mayes live in comfort on less than fifty dollars a month. As testified to by Robert B. Mayes, the amounts fixed by the chancellor for the support of the beneficiaries are the very least amounts on which they can live in comfort.

The court below, however, erred in making the annual allowances for the beneficiaries subject to future modification. The amounts ought to have been fixed definitely, for all time to come, so as to prevent any future uncertainty or confusion in the administration of the estate.

R. B. Mayes, appellee and cross-appellant, *in propria persona.*

Since I appear in this case as one of the litigating parties, I deem it just to myself to say to the court that I have no personal interest therein. The estate I represent has been so complicated that I felt it necessary that some action should be taken in order that the complication might be cleared up while living witnesses knew all the facts. In a certain sense, and only since the complication arose, I have acted as quasi trustee, simply trying to guide the estate so as to effectuate and make certain that the terms of the will of my father should be carried out as he intended when he made it.

WHITFIELD, C. J., delivered the opinion of the court.

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Opinion of the court.

The petition in this case is as follows:

"This, the petition of Robert B. Mayes, this day exhibited against John B. Mayes, executor of the last will and testament of Herman B. Mayes, deceased, John B. Mayes personally, Jos. D. Mayes, Wm. W. Mayes, Alice Mayes, Mrs. Cynthia A. Ware, Mrs. Mary Jane Decell, Mary E. Cook, Nora Belle Cook, and Carrie Cook, would respectfully state and show to the court as follows:

"(1) That the said defendants John B. Mayes, Jos. D. Mayes, Wm. W. Mayes, Alice Mayes, Mrs. Mary Jane Decell, Mary E. Cook, Nora Belle Cook, and Carrie Cook are all resident citizens of the county of Copiah, state of Mississippi, and that defendant Mrs. Cynthia A. Ware is a resident citizen of the county of Hinds, state of Mississippi. That defendants Nora Belle Cook and Carrie Cook are minors, that their parents are dead, and that they have no legal guardian.

"(2) That your petitioner and defendants, except Mary Cook, Nora Belle Cook, and Carrie Cook, are children of the late Herman B. Mayes, who departed this life in the county of Copiah, state of Mississippi, on the 6th day of June, 1891, and that the defendants Mary Cook, Nora Belle Cook, and Carrie Cook are the grandchildren of the said Herman B. Mayes deceased, they being the children and sole surviving heirs of Mrs. Emma Cook, a daughter of the said Herman B. Mayes, deceased; the said Emma Cook having departed this life, intestate, on the 10th day of June, 1900. That your petitioner and said defendants are all the surviving heirs at law of the said Herman B. Mayes, deceased.

"(3) That the said Herman B. Mayes, deceased, left a last will and testament, which was duly admitted to probate on the 10th day of January, 1891, and the said John B. Mayes, the executor and trustee named in said last will and testament, qualified as such executor and trustee and entered upon the discharge of his duties as said executor and trustee of the estate of the said Herman B. Mayes, deceased. That said will is on file

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among the papers in the above-styled cause, but for more ready reference your petitioner files herewith a copy of said will, marked as 'Exhibit B' to this petition.

"(4) That said Herman B. Mayes, during his lifetime, indorsed a note in favor of the First National Bank of the city of Jackson, Miss., as surety for the said John B. Mayes, for a large sum of money, which sum was afterwards reduced by payment by the said John B. Mayes until there was due a balance of about $1,525. That the First National Bank brought suit at law on said note against the said John B. Mayes, personally and as executor of the estate of the said Herman B. Mayes, deceased, and a judgment was rendered against them in the sum of $1525. That afterwards, to wit, some time during the year 1896, a petition was filed in the chancery court of Copiah county by the said First National Bank against the said John B. Mayes, executor of the estate of Herman B. Mayes, deceased, and against all the heirs at law of the said Herman B. Mayes, deceased, praying for a sale of the lands belonging to the estate of the said Herman B. Mayes, deceased, for the payment of said judgment held by said First National Bank. That by consent of all the parties to said petition a decree was rendered on the 10th day of August, 1896, by the chancellor in vacation, ordering that the following described lands be sold to pay said debt, to wit: All of section 34 except W. ¼ of N. W. ¼ and W. ½ of W. ½, section 35, township 10, range 7 E., and N. ½ of N. W. ¼, section 2, and N. ½ of N. ½ and S. W. ¼ of N. W. ¼, section 3, township 9, range 7 E., containing 1,000 acres, more or less; also lots twelve (12) and thirteen (13), in square 33, in the town of Hazlehurst, Miss.; also lots nine (9), ten (10), and eleven (11), in square 33, in the town of Hazlehurst, Miss., excepting, however, the lot owned by J. S. Sexton in said square 33—Geo. B. Nelson having been duly appointed commissioner to make said sale. That said lands were sold by the said Geo. B. Nelson, commissioner, and on the 11th day of December, 1896, by decree of the chancery court of the county of Copiah afore-

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said, all the parties to the petition aforesaid consenting thereto, the sale of said lands was confirmed, and the said commissioner was ordered to execute a deed conveying the same to Mrs. Charity Mayes, who was the wife of the said Herman B. Mayes, deceased, and the mother and grandmother respectively of your petitioner and the defendant herein, and in obedience to the decree of said court the said Geo. B. Nelson, commissioner, in consideration of the sum of $1,525, executed and delivered a deed conveying said lands to the said Mrs. Charity Mayes, which said deed was duly recorded in Book WW, page 138, of the Records of Deeds of said county of Copiah.

"(5) That on the 4th day of June, 1896, the said Mary J. Decell, then Mayes, the said John B. Mayes, Mrs. Cynthia A. Ware, Mrs. Emma Cook, Jos. D. Mayes, Wm. W. Mayes, and your petitioner, Robert B. Mayes, executed a deed wherein they conveyed to the said Mrs. Charity Mayes the lands aforesaid for the expressed consideration of $100, which deed was duly recorded in Book VV, page 417, of the Records of Deeds of the county of Copiah.

"(6) That the said Mrs. Charity Mayes, in order to settle the amount of her bid and pay the amount owing by the estate to the said First National Bank, to wit, the sum of $1,525, negotiated a loan with the British-American Mortgage Company, Limited, in the sum of $3,000, and to secure said loan a deed of trust was executed by her and the said John B. Mayes, in which said deed of trust the lands aforesaid were conveyed to Francis B. Hoffman, trustee for the British-American Mortgage Company, Limited; said deed of trust being of date 2nd day of September, 1889, and recorded in Book 59, page 19, of the Records of Deeds of said county of Copiah. That from the proceeds of said loan the amount aforesaid, owing by the estate of the said Herman B. Mayes, deceased, to the First National Bank, was paid, and the balance of said loan was paid over to and used by the said John B. Mayes individually.

"(7) Your petitioner further states that on the 30th day of November, 1904, there was then due and owing on account of

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the indebtedness in favor of the British-American Mortgage Company, Limited, aforesaid, the sum of $2,500, and in order to pay said indebtedness the said Mrs. Charity Mayes and John B. Mayes negotiated a loan with the Merchants' & Planters' Bank, of the town of Hazlehurst, Miss., and to secure said loan executed a deed of trust to F. W. Ellis, trustee for said bank, on said date, wherein was conveyed to said F. W. Ellis, trustee for said Merchants' and Planters' Bank, the lands aforesaid, which deed of trust was duly recorded in Book 71, page 245, of the Records of Deeds of said county of Copiah; and your petitioner states that there is now due and owing to said Merchants' & Planters' Bank on account of said deed of trust the sum of $2,500, with interest thereon from November 30, 1906, up to the present time, which is a valid and subsisting lien on said lands, inasmuch as the said Merchants' & Planters' Bank was a *bona fide* incumbrancer for value; and your petitioner says that the lien of the said Merchants' & Planters' Bank is in no wise intended to be attacked by him in this petition.

"(8) Your petitioner further states that on the 15th day of February, 1905, the said Mrs. Charity Mayes executed a deed in which she conveyed to your petitioner the lands aforesaid, which said deed was duly recorded in Deed Book 3G, page 108, of the Records of Deeds of said county of Copiah, a certified copy of which said deed is filed herewith, marked 'Exhibit C,' and prayed to be taken as a part of this petition.

"(9) That the said Mrs. Charity Mayes departed this life on the 19th day of December, 1906, intestate, leaving surviving her as her heirs at law your petitioner and the defendants herein.

"(10) Your petitioner says that it was never the purpose or intention of the said Mrs. Charity Mayes, in obtaining the legal title to said lands, to subvert the will of her husband, the said Herman B. Mayes, but that she held the title to said lands at all times in trust for the benefit of the estate of the said Herman B. Mayes, deceased, and during her lifetime the said John B. Mayes, as executor of the estate of the said Herman B. Mayes,

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deceased, continued to exercise exclusive management and control over said lands, just as he did over the other property, real and personal, belonging to said estate. That the purpose of the said Mrs. Charity Mayes in obtaining the legal title was in order to raise money to pay the debt owing by the estate to the First National Bank as aforesaid.

"(11) That, while the legal title to said lands was conveyed by the said Mrs. Charity Mayes to your petitioner, it was conveyed by her with the distinct understanding that the said lands should be held in trust by the said Robert B. Mayes for the estate of the said Herman B. Mayes, deceased, and that upon the liquidation of all debts due by said Mrs. Charity Mayes to the Merchants' & Planters' Bank, secured by the deed of trust aforesaid, the said lands were to be reconveyed by the said Robert B. Mayes to said estate, it being the intention of the said Mrs. Charity Mayes in her lifetime, at all times, and of your petitioner, to have the *status quo* restored, and the will of the late Herman B. Mayes, deceased, carried out as written; and ever since the death of the said Herman B. Mayes, notwithstanding the fact that the legal title passed out of the estate, said estate has been administered, managed, and controlled by the said John B. Mayes under the terms of the said will, and is now being so managed and controlled by the said John B. Mayes as executor and trustee under said will.

"(12) That on the 24th day of September, 1906, the said Mary J. Mayes, named as one of the devisees in item second of said will, intermarried with one John S. Decell, and according to the provisions of item second of said will, upon her marriage, her right to a comfortable support and maintenance out of said estate ceased.

"(13) That by reason of the death of the said Mrs. Charity Mayes and the marriage of the said Mary J. Mayes the devisees entitled to take under item second of said will have been reduced to two, to wit, defendants Alice Mayes and Wm. W. Mayes.

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"(14) That under and by virtue of the power conferred upon said John B. Mayes, executor, in item sixth of said will, the said John B. Mayes, after taking possession of said estate, sold small, scattered tracts of land belonging to the estate, and with the proceeds from said sales he from time to time improved the farm lands described in the deed aforesaid, 'Exhibit C,' which for brevity will hereafter be called the 'Browns Wells Plantation.' That he cleared land and built fences and numerous cabins on said Browns Wells Plantation, until the same is now in a high state of cultivation and capable of producing considerable revenue to said estate. That by virtue of the sales aforesaid the estate of the said Herman B. Mayes, deceased, now consists almost entirely of said Browns Wells Plantation and real estate owned by said estate in the town of Hazlehurst, consisting of the family residence and an office and a small residence which said office and small residence are now being rented for the sum of $15 per month. That the Browns Wells Plantation aforesaid, properly managed, ought to bring in a good revenue to the estate.

"(15) Your petitioner states that he has now in his possession, on deposit in the Merchants' & Planters' Bank, in the town of Hazlehurst, a small sum of money, being the sum turned over to him by John B. Mayes on account of the sale of certain real estate which the said John B. Mayes had sold as executor of said estate, under the power conferred upon him in item sixth of said will. Your petitioner says that in his opinion a reasonable amount ought to be set aside out of the said money now on hand for the comfortable support and maintenance of the said Alice Mayes and Wm. W. Mayes, during the year 1908, and that the balance remaining should be applied to the indebtedness to the Merchants' & Planters' Bank, secured by the deed of trust aforesaid.

"(16) Your petitioner states that although the legal title has been in him since the execution of the deed, 'Exhibit C,' he has not derived one cent of revenue therefrom, but that he has held

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said lands in trust for the benefit of said estate, and subordinate to the provisions of the last will and testament of his father, the said Herman B. Mayes, deceased; and he files this petition for the purpose of surrendering the trust and reinvesting the estate of the said Herman B. Mayes, deceased, with the legal title to said lands, in order that the provisions of the said last will and testament may be strictly carried out; and he asks the court to cancel the deed held by him, subject to the deed of trust held by the Merchants' & Planters' Bank aforesaid, the money secured in said deed of trust having been advanced by the said Merchants' & Planters' Bank in good faith and without knowledge of any trust.

"(17) Your petitioner states that, according to the provision of item second of the said last will and testament, it was the intention of the testator to provide a comfortable support and maintenance for defendants Alice Mayes and Wm. W. Mayes for and during the term of their lives, and that it was further provided in item third of said will that after the death of the said Mrs. Charity Mayes, when the number of those provided for in the second item of the will should be reduced to two by reason of death or by marriage of any of said daughters, and the condition of the estate and the object secured in said item second would justify, the executor should make such division of the property then on hand as might be just and practicable, not trenching on the support of those remaining of the persons mentioned in said second item. Your petitioner says that, while the number of devisees entitled to claim the bounty of the testator under said second item of the will has been reduced to two by death and marriage, yet nevertheless the condition of the estate does not justify any division among the rest of the heirs at the present time; but your petitioner says that, after the payment of debts, taxes, expenses, and the comfortable support and maintenance for the remaining devisees in said item second, there will be little, if any, revenue left from said estate; and your petitioner says that it would best subserve the interests of

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all parties for the estate to be kept together during the lives of the said Alice Mayes and Wm. W. Mayes, and any net revenue that may be derived therefrom could be divided among the rest of the heirs of said estate.

"(18) Your petitioner further says that he is desirous of having the terms of said will interpreted, and he says that it is to the interest of all parties that an amount necessary for the comfortable support and maintenance of the said Alice Mayes and Wm. W. Mayes, taking into consideration their rank and station in life, should be fixed by the court.

"The premises considered, your petitioner prays that the defendants may be summoned by proper process to make answer to this petition, and that on the hearing of said petition the court may interpret said will, and by decree declare what shall be a comfortable support and maintenance yearly, each, for the said Alice Mayes and Wm. W. Mayes, and that when said sum shall be so ascertained the executor of the estate be ordered to pay each of them said amount yearly, and that if any surplus may remain after the payment of said sum for their support and maintenance, and after the payment of costs of administration, taxes, and other charges, and debts against the estate, such surplus be divided among the heirs of said estate, and that the deed, 'Exhibit C,' now held by your petitioner, may be cancelled, and that the title to the lands described therein may be decreed to be in the estate of the said Herman B. Mayes, deceased, subject to the rights of the said Merchants' & Planters' Bank, of Hazlehurst, Miss., and that the court may direct your petitioner what disposition to make of the money now in his hands, belonging to the estate as aforesaid. And, if mistaken in the relief prayed for, then your petitioner prays such other, further, and general relief as he may be entitled to in the premises, and as to the court may seem meet and proper. And as in duty bound your petitioner will ever pray, etc. Signed on this 20th December, 1907. ROBERT B. MAYES."

The testimony taken in the case shows every averment or fact

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in this petition to be true as alleged. The will of Herman B. Mayes, "Exhibit B" to the petition, is as follows:

"The State of Mississippi, Copiah County.

"I, Herman B. Mayes, of the said county and state, being of lawful age and of sound and disposing mind, do make and publish this my last will and testament, revoking all others.

"Item First. I direct that my just debts be paid by my executor, hereinafter named, out of my estate.

"Item Second. My will is that after the payment of my just debts the whole of my property remaining, real and personal, of every kind, be kept together undivided until hereinafter provided, under the control, management and direction of my executor, as such and as a trustee, to whom I hereby devise and bequeath the same, in trust, nevertheless, in the manner and for the purpose as follows, to wit: The property and estate so devised and bequeathed to stand charged, as well the body as the income thereof, primarily with whatever sum or sums necessary for the comfortable support and maintenance of my beloved wife, Charity Mayes, and my daughters Mary Jane and Alice and my son William, for and during the term of their lives, and to remain thus charged to the measure and extent of such comfortable support and maintenance and the measure of the estate for them and each of them and the survivor of them.

"Item Third. It is my will that after the death of my said wife when the number of those provided for in the second item hereof shall be reduced to two or less by death, or by marriage of my said daughters or either of them, and the condition of my estate and the objects secured in the said second item will justify, my executor shall make such division of the property then on hand, not trenching on the support of those remaining of the persons mentioned in the said second item, as may be just and practicable, dividing according to the law of distributions, giving equal shares to my surviving children and to the descendants of a deceased child the parent's share: and on the death of the last survivor of those mentioned in the second item, a com-

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plete or farther division shall be made, it being my will to postpone a division of my estate until the objects set forth in said second item of this will shall have been secured.

"Item Fourth. It is my will that upon the marriage of one or both of my daughters mentioned in the said second item, that the provision for her support shall cease, and such daughter shall thereafter only be entitled to her share of the estate as may fall to her on a division thereof as hereinbefore provided.

"Item Fifth. It is my will that my beloved wife shall possess and enjoy the use of the dwelling house in which I now reside in Hazlehurst, for and during her life for herself as a home, and as a home for such of the children mentioned in said second item as may choose to remain with her, as a right in her and them; and should it be found necessary or expedient, my said wife shall be provided in any event out of my estate with a home during her life.

"Item Sixth. I appoint my son, John B. Mayes, executor of this my will and trustee for the objects herein declared, and empower and direct him in providing for my debts, to dispose of such property for that purpose as may not be yielding increase by interest, rents, or other issues, giving him power without application to any court, to sell such property for such purpose at public or private sale; and I hereby empower him, for the general objects herein declared and to the end of increasing and making more certain the income from my estate, to improve the property, to lease and sell the same at public or private sale, for reinvestment for the purposes of this my will, without application to any court, having confidence in his judgment and integrity and intending to give him ample power of management and control and direction of my estate, in order the more effectually to secure objects set forth in the provisions of this my well.

"And lastly it is my will and desire that no bond shall be required of him for the faithful performance of his trust."

Process was duly served on all the defendants, and decree *pro*

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confesso was had against defendants John B. Mayes, individually and as executor and trustee of the estate of Herman B. Mayes, deceased, William W. Mayes, Alice Mayes, Mrs. Cynthia A. Ware, Mrs. Mary Jane Decell, Mary E. Cook, and Joseph D. Mayes. A guardian *ad litem* was duly appointed for the infants, on whom process had been duly executed personally, and the cause proceeded to final hearing upon the petition, and upon process waivers, pleadings, and proof taken in open court, and the cause was taken under advisement for decision in vacation on October 12, 1908. On November 2, 1908, the chancellor entered his final decree, which is as follows:

"Estate of Herman B. Mayes, Deceased.

"John B. Mayes, Executor.

"In the Chancery Court of Copiah County, State of Mississippi.

"On Petition of Robert B. Mayes for Construction of Will, etc.

"This cause coming on for hearing on petition of Robert B. Mayes, for the construction of the will of Herman B. Mayes, deceased, etc., and decree *pro confesso* and proofs submitted at the hearing, oral and record, and it appearing to the court that a decree *pro confesso* has been heretofore rendered against all the adult defendants named in said petition, it fully appearing that all the adult defendants had either been served with summons or had waived same, and that the minor defendant's, to wit, Nora Belle Cook and Carrie Cook, having neither father nor mother living, nor legal guardian, have been duly and legally summoned, the court, having heard all the testimony and being fully advised in the premises, doth find and decree as follows, viz.:

"(1) That in compliance with the prayer of petitioner, the said Robert B. Mayes, it is ordered that the deed executed in his favor on the 5th day of February, 1905, by the late Mrs. Charity Mayes, recorded in Deed Book 3G, page 108, of the Records of Deeds of Copiah county, being 'Exhibit C' to the petition, be and the same is hereby ordered to be canceled by the clerk of this court, and the legal title to all the lands described in said

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deed is hereby declared to be reinvested in the executor and trustee named in the last will and testament of the said Herman B. Mayes, deceased, in trust for said estate, and subject to all the provisions in said last will and testament contained, and impressed with all the trusts in said last will and testament declared, and Robert B. Mayes is hereby directed and required to execute deed reconveying all property deeded to him by Mrs. Charity Mayes to the trustee of the Herman B. Mayes' estate for the purposes named in the last will and testament of the said Herman B. Mayes. And it is further ordered and directed that all the deeds heretofore made to Mrs. Charity Mayes, for any purpose, by any party or person, be and the same are hereby ordered to be canceled by the clerk of this court, and the property is hereby declared to be the property of the Herman B. Mayes estate, and the will of the said Herman B. Mayes is hereby in all respects reinstated and declared to be the true title and source of power to deal with the estate; it being manifest from the testimony that Mrs. Charity Mayes never claimed any of said property, except in subservience to the will, and never paid any actual money for same.

"(2) It appearing that the said Robert B. Mayes has at all times held said lands in trust for said estate, and under the terms of said last will and testament, and that he has made no profit on said estate, but has faithfully administered the same in strict accordance with the terms of said last will and testament, and that he has faithfully accounted for so much of said estate as has been handled by him, it is ordered and declared that he be discharged from any further liability on account thereof.

"(3) It appearing that the corpus as well as the income of the estate is charged with the comfortable support of such of the beneficiaries named in item 2 of the will as now have the right to claim it, and that the objects of the bounty of the said testator named in item 2 of said last will and testament have been reduced, by the death of the said Mrs. Charity Mayes and by the marriage of Miss Mary Jane Mayes, to two, namely Alice

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Mayes and William W. Mayes; and it further appearing to the court that the conditions of the said estate and the objects declared in said second item of said last will and testament will not justify a division of said estate, and that a sale or partition in kind of any portion of said estate would seriously jeopardize the comfortable support and maintenance of the said Alice Mayes and the said William W. Mayes, and thus defeat the manifest and paramount intent of said testator, it is therefore ordered that the said estate be kept intact, in order to accomplish the main purpose of the will, and that none of said estate be sold for a division or partition in kind.

"(4) It appearing further from the testimony that the sum of nine hundred dollars ($900) per annum is necessary for the comfortable support and maintenance of the said Alice Mayes, in accordance with her rank and station in life and the manifest purpose and intent of the said testator, it is ordered that the executor and trustee of said estate pay over to the said Alice Mayes out of the net ncome of said estate, for her yearly support and maintenance, said sum of nine hundred dollars ($900); and it appearing further from the evidence that the sum of six hundred dollars (600) per annum is necessary for the comfortable support and maintenance of the said William Mayes, therefore, until further directed by the court, it is ordered that the said executor and trustee expend said above amounts annually on said William W. Mayes and Alice Mayes, said sums to be expended under the direction of said Robert B. Mayes, if the beneficiaries named consent thereto, and to remain as the fixed annual allowance of each of the two beneficiaries named, subject to future modifications by the court if there shall arise such necessity, and the trustee shall maintain in good repair a home for the two beneficiaries herein named, to wit, Alice and William W. Mayes, and the cost of keeping up the said home, excluding the cost of provisioning same, shall be borne by the trustee and not deducted out of annual allowance of Alice and William W. Mayes, and it

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shall also be the duty of the trustee to pay all taxes and insurance on said home. It further appearing that William W. Mayes is now living in the house with Alice Mayes, and a home being maintained for him, it is ordered that the sums herein allowed be deposited in the name of Alice Mayes, and subject to her check alone, under the supervision and direction of Robert B. Mayes, as long as the beneficiaries consent thereto. So long as the home is maintained as now, all money shall be subject to the check of Alice Mayes; but, in the event of the breaking up of the home, then the amount allowed to William W. Mayes is to be spent under the direction of Robert B. Mayes, if the said William W. Mayes shall consent thereto. Nothing in this decree is to be construed as limiting the right of the beneficiaries to resort to the corpus of the estate for a comfortable support if the estate cannot be made to yield it as an income, nor as limiting the beneficiaries now living and named in item 2 to mere necessaries; but they are to be comfortably supported in a home of their own if they so desire, or in such other way as may best suit their wishes, commensurate with the estate and purpose of the will, but there shall be no trenching on the corpus of the estate unless absolutely necessary. In the event that in the future there should not be enough net income from said estate to realize said amounts for the support of said Alice Mayes and the said William W. Mayes, it is further ordered that the said net income be divided between said devisees proportionately to the amounts named for their support, if said Alice Mayes shall not then be maintaining a home for said William W. Mayes; but, if she is, then said *pro rata* sums shall be deposited to her credit and disbursed by her as the head of the household, and in any and all events all said sums are to be disbursed under the direction of Robert B. Mayes so long as the beneficiaries consent to same.

"(5) Should there be in the future any surplus left of said net income, after the said devisees shall be paid the amounts named for their yearly support as aforesaid, and after all the

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debts and expenses of all kinds incident to the protection, development, and management of said estate shall have been paid in full, said amount shall be ratably divided among the other children and grandchildren of said Herman B. Mayes, deceased, according to the provisions of item 3 of said last will and testament.

"(6) It is further ordered that the deed of trust, executed by the said Mrs. Charity Mayes and John B. Mayes, in favor of the Merchants' & Planters' Bank of Hazelhurst, Miss., recorded in Deed Book 71, page 245, of the Records of Deeds of said county of Copiah, shall remain in force and be in no wise impaired by the cancellation of deed, 'Exhibit C,' or any intermediate deeds appearing in the name of Mrs. Charity Mayes, but that said lien shall remain in full force and effect as a substituting liability against said estate, and as a paramount lien on the lands belonging to said estate and described therein. This decree shall in no way affect any security held by the Merchants' & Planters' Bank, whether same is specifically mentioned herein or not.

"(7) It is ordered that defendants be allowed ninety days in which to file a bill of exceptions, and that the cost of this proceeding be taxed against said estate. It further appearing that the court having, by written order on the minutes of said court, ordered that this cause be taken under advisement for decree in vacation, and now having maturely considered same, signs this decree in vacation, and directs the same be spread upon the minutes of the court as the final decree in this case.

"Ordered, decreed, and adjudged on this 2d day of November, 1908.

"G. G. LYELL, Chancellor."

From this decree, an appeal and cross appeal have been regularly prosecuted.

On November 7, 1908, a petition was filed by Robert B. Mayes, showing to the court that within a few days last before November 7, 1908, the said John B. Mayes, executor, etc., had

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signified his desire to be relieved from the executorship and trusteeship of the said estate, and had in writing declared that he would have nothing further to do with the management of the estate, and consequently the estate was, at the date of the petition, without an executor and trustee. Now, in the decree which had been just rendered November 2, 1908, it had amongst other things, been decreed, in item 1 of said decree, that the "legal title to all the lands described in said deed from Charity Mayes to Robert B. Mayes was thereby declared to be reinvested in the executor and trustee named in the last will and testament of the said Herman B. Mayes, deceased, in trust for said estate, and subject to all the provisions in said last will and testament contained, and impressed with all the trusts in said last will and testament declared," etc. This reinvestment of the title in the executor and trustee, John B. Mayes, was made in pursuance of this decree on the 2d. of November, 1908; and, as shown before, his resignation and the appointment by the court, under this last petition, of John S. Decell, as administrator with the will annexed and trustee of the estate of Herman B. Mayes, deceased, was made. As the record before us stands, therefore, the decree appealed from is one which reinvested the title in John B. Mayes. The decree appointing Decell administrator with the will annexed and trustee, etc., is not complained of in this proceeding in any way.

We think it is perfectly manifest, from the terms of the will of Herman B. Mayes, that all his estate, as well the body as the income thereof, stood charged primarily with whatever sums were necessary for the comfortable support and maintenance of his wife, Charity Mayes, and his daughters, Mary Jane and Alice Mayes, and his son, William W. Mayes, during the term of their natural lives, and during the lives of the survivors or survivor of them. Mary Jane Mayes married and under the terms of the will ceased to be entitled to this provision. The mother is dead, and the two surviving objects of this bounty of the testator are Alice Mayes and William W. Mayes alone. It is also, we

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think, clear that it was the purpose of the testator that his estate should be kept together, undivided, until, as stated in item 3 of the will, the number of the beneficiaries should be reduced to two or less, and "the condition of my estate and the objects secured in the said second item will justify my executor in making such division of the property then in hand, not trenching on the support of those remaining of the persons mentioned in the said second item." He provided in this third item, provisionally and contingently, for a preliminary partial division, if one could be made that should be just and practicable, keeping in view always, as the paramount consideration, that the condition of his estate and the comfortable maintenance and support of those named in item 2 should be kept in mind; the last clause of item 3 expressly stating that it was his will "to postpone a division of his estate until the objects set forth in said second item of his will should have been secured."

Looking through the testimony in this case, it is perfectly manifest that there cannot within the spirit and purpose of this will, be any division made at this time of the property. The income seems scarcely sufficient to pay the charges on the property and the $125 per month allowed for the support and maintenance of Alice Mayes and William W. Mayes. They manifestly are entitled to a home as "a right in them" whilst they live. The provisioning of such home, however, is not included in this clause of the will. Everything necessary to maintain the home, paying of taxes, and keeping it in proper and comfortable repair is included; but the living expenses involved in the purchasing of supplies, such as groceries, etc., was never meant to be included, over and above a money allowance for that same purpose. Consequently the clause in the decree directing "that the trustee shall maintain in good repair a home for the two beneficiaries herein named, to wit, Alice and William W. Mayes, and the cost of keeping up the said home, excluding the cost of provisioning same, and that these expenses shall be borne by the trustee, and not deducted out of the annual allowance of Alice

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and William W. Mayes, and that it shall also be the duty of the trustee to pay all taxes and insurance on said home," was correct. We have critically examined this whole record and the decree of November 2, 1908, and we affirm said decree in all respects.

It is complained that the chancellor should have made his order final as to the $900 per year to be paid to Alice Mayes and the $600 per year to be paid to William W. Mayes, etc., and not, as he did, subject to future modifications by the court, if there should arise such necessity. We cannot concur in this criticism of the decree. We think the chancellor's decree was eminently correct in this respect, and in every other respect. Whether this support can be increased or diminished, or ought to be, is a matter for future consideration, depending upon circumstances at the time. When a division or partition in kind, or a sale of said property for the division of proceeds, can be made, is for the chancellor's future judgment, governed by the third item in said will. Circumstances to occur in the future alone can settle this, in view of said third item. Whilst that matter is not before us on this appeal, it is obvious that John S. Decell, having been appointed administrator with the will annexed and also trustee under the will, John B. Mayes, the former executor and trustee having resigned, and this appointment of Decell having occurred after this decree was entered, that the chancellor, on the return of this case, should enter a decree investing the title in the said John S. Decell, as it had been theretofore invested in John B. Mayes.

The direct appeal in this case is prosecuted by John H. Long, guardan *ad litem* of minors, and the assignments of error are that the decree was erroneous in not directing a partition of the property to be had, and in allowing too large a sum for the maintenance of the two beneficiaries, Alice Mayes and William W. Mayes; and the evidence manifestly shows that the decree is entirely correct under the provision of this will on both these points, and the decree on the direct appeal is affirmed.

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Opinion of the court.

The cross-appeal of Robert B. Mayes, petitioner, assigned as error, first, that the court erred in not making the amounts necessary for the comfortable maintenance of Alice Mayes and William W. Mayes sufficiently large, because they were not enough to support them, respectively, in accordance with their rank and station in life, and in accordance with the manifest purpose and intent of the testator; and, secondly, because the court erred in making said allowance subject to future modification by the said court, if there should arise such a necessity. It is perfectly obvious, under the terms of the will and the evidence in this case, that these assignments of error on this cross-appeal are untenable. The decree on the cross-appeal is therefore affirmed.

No other errors are assigned, either on the direct or cross-appeal, than those we have specifically mentioned, and the chancellor committed no error in respect to any of these things assigned as error. Consequently we affirm the decree on appeal and cross-appeal, as stated. But all parties in interest on the direct and cross-appeal have joined in asking us to construe the provisions of this will, so far as would be necessary for the guidance of the administrator with the will annexed and trustee, John S. Decell; and therefore, in addition to what we have already said, we desire now to say further that we do not think the decrees should have left any doubt as to the primary duty of discharging the indebtedness due the Merchants' & Planters' Bank. As to that, the chancellor is directed to enter a supplemental decree, expressly providing that all the money derived from the income of this estate, of every kind, after the payment of taxes, repairs, and other proper charges, and the sum of $125 per month to Alice and William Mayes as stated in the decree, and any other proper costs incurred in the cause shall be devoted—that is to say, such surplus shall be wholly applied—to the extinguishment of the debt due the said Merchants' & Planters' Bank, and shall be continuously so applied—that is, all of said surplus—until said debt shall have been fully paid off and discharged.

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Syllabus.

The chancellor should further, in such supplemental decree, direct that the property should be kept intact, without division, until such debt shall have been paid off and discharged, and that when such debt shall have been paid off and discharged, then, at that time, any party interested may make an application for further directions by the court, as to what disposition shall be made of said surplus thereafter accruing, and generally for further directions.

Decree *affirmed* on direct and cross appeal, and *remanded*.

MAYES, J., being a party to the suit took no part in the decision.

ILLINOIS CENTRAL RAILROAD COMPANY ET AL v. STATE OF MISSISSIPPI EX REL., ETC.

[48 South. 561.]

1. SUPREME COURT PRACTICE. *Assignment of error. Peremptory instruction. Argument.*

An assignment of error predicated of a determinative peremptory instruction given by the trial court brings the case into review in the supreme court in all of its aspects, and neither party is confined in argument to points made in the trial court.

2. MUNICIPALITIES. *Laying out streets. Eminent domain. Code* 1906, §§ 3337, 4400. *Railroad track crossed.*

A municipality in laying out a new street, or extending an old one, crossing a railroad track, must, as provided in Code 1906, § 3337, adopt the procedure provided in Code 1906, ch. 43, relating to the subject of eminent domain; it cannot proceed in so doing under Code 1906, § 4400, relating to the laying out of highways by counties.

3. SAME. *Same. Viaduct. Bridge.*

A municipality cannot, by ordinance or otherwise, compel a railroad company to construct a viaduct over its track at a point where a street has not been legally laid out across the same.

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Brief for appellant.

4. CONSTITUTIONAL LAW. *Constitution* 1890, *sec.* 17. *Eminent domain Property. Value. Railroad right of way. Street crossing.*

Under constitution 1890, sec. 17, providing that private property shall not be taken or damaged for public use, except on due compensation first made:—

(*a*) Every species of property of value, and every right or interest in property is included; and

(*b*) The term, value, as applied to property, is the price deemed or accepted as equivalent to the utility of the thing; and

(*c*) The law infers value from the term, property, and where no value is shown nominal value will be inferred; and

(*d*) A municipality cannot take the right of way of a railroad company, or a part thereof, for a street crossing, except by eminent domain proceedings and due compensation.

FROM the circuit court of Lincoln county.

HON. MOYSE H. WILKINSON, Judge.

The State, *ex rel.*, etc., appellee, was plaintiff in the court below; the railroad comoanies, appellants, were defendants there. From a judgment in plaintiff's favor defendants appealed to the supreme court. The opinion of the court fully states the facts of the case.

Mayes & Longstreet, for appellant.

The fact that the appellants were given no notice of the action by the board of mayor and aldermen which consisted of a subjection of railroad property to an additional servitude, is admitted in the record.

The ordinance of 1906 which extended Yellow Pine street across the railroad right of way and tracks, and ended it on the side of railroad right of way land on the east, was void and of no effect because no notice of the pendency of such a proceeding was given to appellant, the only parties in interest affected thereby.

The property of corporations or private citizens cannot be condemned in this state to any public use without notice to the owner or owners.

In the chapter on Municipalities, Code 1906, § 3337, it is pro-

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Brief for appellant.

vided that towns and cities may exercise the right of eminent domain in laying out streets, avenues, alleys, parks, etc., and in the straightening or widening of streets, etc., and changing the grade therefor.

In the chapter on Eminent Domain, Code 1906, § 1854, full and specific instructions as to the proceedings in consideration cases are given.

The extension of Yellow Pine street could not be validly made without notice to the railroad companies over whose lands only it was sought to be extended. It has been repeatedly held that a statute providing for the taking of property of persons or corporations without just compensation, is unconstitutional, and it is a proposition about which there is no longer serious debate, that any order of expropriation by anybody or authority is void, unless the person or owner of the lands to be effected thereby, can have his day in court.

The court will readily see that if the ordinance of the year 1906 be held to be void, and of no effect, it is absolutely fatal to this proceeding, because, if the order of extension be void, there is no foundation on which to rest the ordinance requiring the building of an overhead bridge or viaduct. This last named order depending for its validity only a legal or entirely pre-existing extension of the street.

Whenever a city proposes to lay out or extend a new street it is incumbent on the city to secure the right of entry and use, either by private treaty with the owner, or in default of this, to condemn the property desired for the public use, by the exercise of the right of eminent domain.

H. Cassedy, for appellee.

The first question presented and discussed by appellants is that the ordinance of 1906, extending Yellow Pine street was void and of no effect as to them because no notice of the pendency of such a proceeding was given. Appellant's able counsel seek to make the turning point of this case depend upon the validity of the ordinance of 1906.

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Brief for appellant.

Article 17 of the constitution does protect private ownership of property, and even the state, the United States or any subdivision, or any public service corporation would be compelled to resort to eminent domain, if an agreement could not be reached. But, have we such a case? What shall we say with reference to a public highway? The railroad is as much a public highway as any of the county roads or city streets. It would be ridiculous to argue that in the event a city, in extending a street, say to a park beyond the city limits, should be required to notify the board of supervisors and pay the county damages for crossing the public roads. The very right to exercise the power of eminent domain by a public corporation is based upon the public use to which the private property will be subjected. I need not cite any authority to support a proposition so well and so long established. Once condemned or dedicated as a public highway is it necessary, or proper, or expedient, to require successive condemnations? Of course I am discussing the situation of a railroad company with reference to the public highways, and not the imposition of an additional servitude upon the fee in the soil, such as the erection of telephone wires on public roads, etc. On this proposition it is of some interest to know that the railroad company accepts its charter with the understanding that it must bow to the will of the legislature, or any lesser body clothed with the power, in the exercise of the police power. On this proposition, I respectfully call the attention of the court to the words of the opinion in *Illinois, etc., R. Co. v. Willenberg,* 117 Ill. 203 (7 N. E. 698, 57 Am. Rep. 862), referred to in our own case of *Illinois, etc., R. Co. v. Copiah County,* 81 Miss. 685, 33 South. 502.

"All property devoted to public use, takes on a nature or qualification quasi public, and for that reason is held to be subject to legislative control in a greater or less decree, to which the mere private property of the citizen is not subjected. . . . But where property belonging to a natural person or a corporation becomes 'affected with a public interest it ceases to be *juris*

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privati only.' Where a party devotes his property to a public use the community at large acquires such a qualified interest as will subject it to legislative control for the common welfare. Accordingly the property of railroads and other public corporations transating business for and with the public has been subjected to burdens not imposed upon the mere private property used purely and exclusively for private interests."

In the case of *Illinois, etc., R. Co. v. Copiah County,* it seems the public road was laid out without any notice to the railroad company by the board of supervisors. In that case, as well as in the instant case, the bridge was the only thing required to preserve the continuity of the highway. The road, without the bridge would stop on either side of the railroad. See also *Illinois Central Railroad Co. v. Swalm,* 83 Miss. 631, 36 South. 147.

The state is clothed with the initial police power over roads and streets, and municipalities and counties are merely political subdivisions of the state and have such of these inherent powers as may be conferred or delegated by the legislature, and so, railroad corporations, as well as municipalities are "created solely by legislative authority and are clothed only with such powers as are expressly granted in the creative act which vitalizes and brings them into existence." *Canton v. Cotton Warehouse Co.,* 84 Miss. 268, 36 South. 266 (105 Am. St. Rep. 428).

MAYES, J., delivered the opinion of the court.

This is a proceeding by mandamus to compel the railroad company to construct a bridge across its right of way in the town of Boguechitto, beginning at the foot of Yellow Pine street. The facts on which it is sought to sustain this petition are as follows, viz.: The petition is filed by the district attorney, in behalf of the state, and recites that a large majority of the citizens of the town filed a petition with the mayor and board of aldermen thereof, praying that Yellow Pine street be opened and extended across the right of way of the railroad

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company and that a bridge or viaduct be built across same. At the next regular meeting of the mayor and board of aldermen succeeding the one at which the citizens' petition was received, the following ordinance was passed, viz.:

"Section 1. Be it ordained by the mayor and board of aldermen of the town of Boguechitto, Mississippi, that the Illinois Central Railroad Company and the Chicago, St. Louis & New Orleans Railroad Company be and they are hereby required to erect, establish, and maintain across their tracks, where Yellow Pine street crosses same, a substantial bridge or viaduct, to be erected and completed within three months from the time this ordinance becomes operative or effective, and thereafter keep the same in good repair.

"Sec. 2. Be it further ordained that this ordinance take effect and be in force from and after thirty days after its passage."

This ordinance was passed some time in March, 1907, and, the railroad companies, one being the lessee and the other the lessor of the tracks, refusing to obey the ordinance and build the bridge, this proceeding was instituted to compel them to do so. It is admitted that no notice was given to the railroad companies of the proposition of the municipality to open up Yellow Pine street across the right of way of the companies; but it is claimed that a copy of the above ordinance was served on the companies before its passage. It clearly appears that in opening up this street a part of the railroad right of way is taken for street use. In truth, the railroad companies seem the only property owners concerned in so far as property is to be taken for street use. The railroad companies answered, denying every allegation contained in the petition, and considerable testimony was taken; but we do not deem it necessary to advert to it, since it is our view that very little of the testimony has any relevancy to the real question in issue. No condemnation proceedings were instituted by the municipality, and no private agreement was had with the companies as to any damage that might be

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done them by the taking of their right of way for other uses. At the conclusion of the case a peremptory instruction was given for the municipality, and the railroad companies were ordered to build the bridge. On the motion for a new trial the granting of the peremptory instruction was assigned as error, and on appeal it is again assigned here. The case having been disposed of by the court by a peremptory instruction, this assignment of error brings into review the entire case, and this answers the contention of appellee that certain arguments are made here for the first time.

We do not consider the question of notice to the railroad companies. Since the municipality proceeded in an unauthorized way, no amount of notice could possibly affect any of the rights of the companies. It would seem that the mayor and board of aldermen were proceeding to open up Yellow Pine street under Code 1906, § 4400; but this section has no application to municipalities, and the procedure there outlined cannot be availed of by municipalities in laying out or changing streets. No other provision for any kind of eminent domain proceedings on the part of counties is to be found in the law save that provided for by Code 1906, § 4400, and this section has application to counties only, and is a substitute for eminent domain proceedings required to be resorted to by all other persons or corporations having the right to condemn private property for public use. This is made clear by referring to Code 1906, § 1854, which provides that "any person or corporation having the right to condemn private property for public use shall exercise that right as provided in this chapter, and not otherwise, except as specified in the chapters on 'Landings,' 'Mills and Milldams,' and 'Roads, Ferries and Bridges.' " Municipalities are not among the class excepted from the operation of the above statute; but, on the contrary, Code 1906, § 3337 gives a municipality the power to exercise the right of eminent domain in the laying out of streets, and, when a municipality undertakes to lay out a new street requiring the taking or damaging of property, it must

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proceed under the provisions of the chapter on eminent domain, "and not otherwise," as is expressly provided in Code 1906, § 1854.

We are not concerned with the reason why the legislature has made Code 1906, §§ 4400, 4401, and 4402, apply to county roads only; but it is manifest that the above sections do only so apply. Many reasons might be given why the legislature so enacted the law for application of the statute. Since the proceedings of the municipality in opening and extending the street were a nullity, it follows that the ordinance requiring the building of the bridge was also a nullity. Code 1906, § 4053, confers no arbitrary power on counties or municipalities to require the building of bridges by railroad companies without reference to where they shall be built; but the bridges can be required to be built only at highway crossings, and there can be no highway crossing until a highway has been lawfully established. It is undeniably true that property devoted to one public use may be taken and used for another, subject to limitations not necessary to be here specified; but, because property may be devoted to a quasi public use and affected with a public interest so to speak, such property cannot for that reason be taken from its owners, or damaged, for another public use, except upon due compensation being made to the owners thereof. We know of no case in this state that has ever held contrary to this. Section 17 of the Constitution of 1890 stands as a sentinel, guarding the right of the private owner of property not to have same taken or damaged for public use, except upon due compensation being first made to the owner, however small may be the value of that taken, or slight may be the damage; and this is true, whether the taking or damage is at the instance of a municipality, county, or other person or corporation possessing eminent domain powers.

The importance of this section of the Constitution as affecting the welfare of the citizenry of the state cannot be too strongly emphasized. The case of *Illinois, etc., R. Co. v. Com-*

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missioners of Highways of Town Mattoon, 161 Ill. 247, 43 N. E. 1100, is a case almost identical with the case here. In the case just cited it was held that the laying out of a highway across a railroad right of way was the taking of private property for public use, entitling the railroad company to compensation therefor; and the court said, on page 251 of 161 Ill., page 1101 of 43 N. E.: "It is the mandate, both of the Constitution and of the statute, that appellant should be paid just compensation for its property taken. Property is the right and interest which one has in lands and chattels to the exclusion of others. The term 'property' includes every species of valuable right and interest. Value is the price deemed or accepted as equivalent to the utility of anything, and compensation is that which constitutes or is regarded as an equivalent. It is impossible to conceive of such a thing as property wholly separated from the element of value. From the very term 'property' the law infers some value; and, if no value is shown, the inference will be that it is the nominal sum of one cent, one penny, or one dollar. Just compensation to the extent of that value was an absolute and constitutional condition precedent to the exercise of the right to take property from the owner under the right of eminent domain." As to what is the measure of damage in such a case the court further said on page 252 of 161 Ill., page 1102 of 43 N. E.: "The measure of compensation is the amount of decrease in the value of the use for railroad purposes, caused by the use for the purposes of a street; such use for the purposes of a street being exercised jointly with the use of the companies for railroad purposes." The case of *Mobile, etc., R. Co. v. Postal Telegraph Company,* 76 Miss. 731, 26 South. 370, 45 L. R. A. 223, adopts the same rule. See, also, the case of *Paterson, N. & N. Y. R. Co. v. Mayor, etc., of City of Newark,* 61 N. J. Law, 80, 38 Atl. 689, in so far as it holds that the laying out of a highway across a railroad right of way is a taking of the property for public use, entitling to compensation therefor.

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Opinion of the court.

Nothing decided in the cases of *Illinois, etc., R. Co. v. Copiah County,* 81 Miss. 685, 33 South. 502, or *Illinois, etc., R. Co. v. Swalm,* 83 Miss. 631, 36 South. 147, in any way affects the questions involved in this case. In neither of the cases was any claim for damages made by the company for the taking or damaging of its property. In the *Copiah County case, supra,* the lawfulness of the highway was not challenged in any way, but the question was as to whether the county could require the construction of a bridge across the right of way of the railroad, at new highway crossings—the statute authorizing this to be done having been passed after the railroad was constructed; and the court held that the statute applied, no matter when the railroad was constructed or the highway first opened up. About the same question was involved in the *Swalm case, supra,* in so far as any question in that case bears any relation to the question here. Instead of the peremptory instruction for plaintiff, a peremptory instruction should have been given for defendant. On the very face of the petition the facts alleged would not warrant the granting of the mandamus.

Reversed and remanded.

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Brief for appellant.

SOLOMON S. STEWART v. BENJAMIN F. PETITT.

[48 South. 5.]

1. JUSTICE OF THE PEACE. *Suit before. When begun.*

An action is not begun before a justice of the peace until the issuance of a summons therein, although a statement of the cause of action had been previously filed, where plaintiff requested the justice not to issue summons thereon at once.

2. SAME. *Code* 1906, §§ 687, 728.

Code 1906, § 728, providing that the filing of a declaration in the circuit court shall be the commencement of an action if a summons shall be issued thereon for defendant, if extended to justices' courts by Code 1906, § 687, has no application where the plaintiff directed a postponement of the issuance of a summons.

FROM the circuit court of Pontotoc county.

HON. EUGENE O. SYKES, Judge.

Petitt, appellee, was plaintiff in the court below; Stewart, appellant, was defendant there. From a judgment in plaintiff's favor defendant appealed to the supreme court.

The defense was predicated of the three years statute of limitations barring suits on open accounts, and the question turned upon when the suit was begun. The other facts are stated in the opinion of the court.

Mitchell & Mitchell, for appellant.

The general rule, except where it is otherwise provided by statute, is that an action is commenced, so as to stop the running of the statute of limitations, from the time the summons or other process is issued. *Christian v. O'Neal,* 46 Miss. 672, 25 Cyc. 1282; *Flournoy v. Lyon,* 70 Ala. 308; *Fairbanks v. Farwell,* 141 Ill. 354; *Belck v. Belck,* 97 Ind. 13. Angel on Limitations, 392, § 312.

Especially is this true in justice of the peace courts. 24

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Cyc. pp. 512 and 513; 12 Am. & Eng. Ency. of Law (1st ed.), 431.

In Murfee's Justice Practice, § 312, is the following statement of the law as applied to justice of the peace courts: "It is sometimes a question of interest to the parties, especially in view of the statute of limitations, when a suit is legally commenced in the court of a justice. The mere filling out of a summons which is then left in the justice's office until the return day, or which is taken by the plaintiff and retained in his own custody, is not the commencement of a suit. The writ must not only be made out but must be issued, with the intent that if practicable, it shall be served. It is not issued if it is delivered to the plaintiff, who retains it in his own hands." *Howell v. Shepard,* 48 Mich. 472; *Gardner v. Weber,* 17 Pick. (Mass.) 407, 412.

There is absolutely no conflict of the authorities on these propositions. An examination of our statute shows, that so far as justice of the peace courts are concerned, these general rules will apply. Code 1906, § 728, provides that the filing of a declaration shall be the beginning of a suit in the circuit court provided a summons issues thereon and the suit shall be deemed to have commenced from the date of filing the declaration. Code 1906, § 2730, provides how suits shall be begun in justice of the peace courts. The party desiring to institute suit shall lodge with the justice the evidence of the debt, statement of account or other written statement of the cause of action, and thereupon the justice shall issue a summons for the defendant, etc.

We call especial attention to the fact that there is no provision in this section, as in section 728, that the suit shall be deemed begun from the date of filing of the written statement.

It seems that the legislature in enacting section 728 realized that no suit would be begun by the filing of a declaration unless provided by statutory enactment, and as no such provision is made in section 2370, the general rule will apply.

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C. A. Bratton, for appellee.

This court has held that in the circuit court an action is begun on the filing of the declaration. *Kelly v. Harrison,* 69 Miss. 856, 12 South. 261. Code 1880, § 1522, declared, as does Code 1906, § 728, the manner of commencing an action in any of the circuit courts of this state shall be by filing, in the office of the clerk of such court, a declaration on which a summons for the defendant shall be immediately issued; and an action shall for all purposes be considered to have been commenced and to be pending, from the time of the filing of the declaration, if a summons shall be issued thereon for the defendant, and if not executed, like process in succession shall be issued in good faith for the defendant. Under the chapter on Justices of the Peace, Code 1906, § 2730, headed "How Suit Begun in Civil Cases" declares that "Any one desiring to sue before a justice of the peace shall lodge with him the evidence of debt, statement of account, or other written statement of the cause of action; and thereupon the justice shall issue a summon for the defendant returnable to the next term of his court, etc." It is true this statute does not say in words, as does section 728, "and an action shall for all purposes be considered to have commenced and to be pending from the filling of the declaration," but does declare that the suit is begun by the filing of the evidence of debt, statement of account or other written statement of the cause of action.

The case of *Christian v. O'Neal,* 46 Miss. 672, cited by counsel for appellant is not in point. The rule as to when suits are begun in justice of the peace courts is now entirely different to the practice under Code 1857.

HARPER,* Special Judge, delivered the opinion of the court.

Pettit sued Stewart to recover on a contract that became due

* One of the judges of the court being unwell, William R. Harper, Esq., a member of the supreme court bar, was appointed and presided in his place in the trial and decision of this case.

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on January 15, 1904. On January 9, 1907, Pettit presented his claim to the justice of the peace, and asked him to file the same, but directed him not to issue summons until he heard further from him. The summons was not issued, as a matter of fact, until January 28th. There is some conflict and uncertainty in the testimony as to the time when Pettit directed the justice of the peace to issue summons, appellant contending that the direction was not given until after January 15th; but both concede that it was some days after the filing of the claim, to wit, January 9th.

The general rule seems to be clearly settled that a suit is not commenced until summons has been issued, and hence this suit was barred, unless prevented by our statute, Code 1906, § 728, on the bringing of suits, which is as follows:

"Except in cases in which it is otherwise provided, the manner of commencing an action in the circuit court shall be by filing in the office of the clerk of such court a declaration, on which a summons for the defendant shall be immediately issued; and an action shall, for all purposes, be considered to have been commenced and to be pending from the time of the filing of the declaration, if a summons shall be issued thereon for the defendant, and, if not executed, other like process, in succession, may be issued, in good faith, for the defendant."

It will be seen that the statute provides that the commencement of the suit shall date from the time of filling the claim or demand provided the summons shall be immediately issued. In the instant case the summons was not immediately issued, but was deliberately delayed by express order and direction of the plaintiff. Under such circumstances we are clear that the commencement of the suit cannot relate back to the time of the filing of the claim, but must be referred to the date of the issuance of the summons itself. The statute must be strictly complied with; otherwise the usual rule of law as to the commencement of suits must govern. Under our view of the law, it makes no difference when the direction for the issuance of the summons

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Brief for appellant.

was given, as the commencement of the suit must date either from the filing of the instrument itself, or from the actual issuance of the summons in good faith, and with intent that the same should be promptly served.

The judgment of the court below is reversed, and the cause remanded, to be proceeded with in accordance with this opinion.

Reversed.

CRENSHAW OIL COMPANY v. HENRY M. JOHNSON, TAX COLLECTOR.

[48 South. 5.]

PRIVILEGE TAXES. *Oil mills. Basis of taxation. Capital. Code* 1906, § 3801.

The "capital" on which privilege taxes on cotton seed oil mills are based, under Code 1906, § 3801, imposing such taxes, is the property invested and used in the business, not necessarily the corporate stock.

FROM the circuit court of, first district, Panola county.

HON. WILLIAM A. ROANE, Judge.

Johnson, tax collector, appellant, was plaintiff in the court below; the oil mill company, appellee, was defendant there. From a judgment in plaintiff's favor for the full sum demanded the defendant appealed to the supreme court.

The facts are stated in the opinion of the court.

Shands & Montgomery and *Alexander & Alexander,* for appellant.

The value of the gin property should not be taken into consideration in determining the amount of the capital of appellant for the purpose of deciding this issue. *Senatobia Oil Co. v. Poag,* 86 Miss. 457.

It is true that the capital stock of this company, and that

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Brief for appellant.

part of the capital stock used in carrying on the oil mill business proper, originally exceeded $30,000; but this tax is not laid on capital stock of a company, but is a tax laid on its capital as distinguished from capital stock. *Hazlehurst Oil Co. v. Decell,* 83 Miss. 346, 33 South. 412.

Thus far this case is settled favorably for appellant by the decisions of this court, but our court has nowhere defined what is meant by the "capital" of a corporation.

In Helliwell on Stock and Stockholders, § 3, p. 3, the author states the true distinction between capital stock and capital when he says:

"The capital stock is the fund, in the form of money or its equivalent, paid in or pledged to the corporation by the shareholders as the financial basis of its business, while the capital of a corporation consists of its money, securities, and such other property as it may chance to possess, from whatever source derived. It will be seen, therefore, that the amount of the capital stock and the amount of capital may vary widely. Assuming that the capital stock has been placed at par, where the corporation has had no losses and no gains, or where profits have been made and distributed in full to the shareholders in the form of dividends, the capital stock and capital will be equal in amount. Where there have been losses the amount thereof if not recouped will represent the excess of the nominal capital stock over the capital. The amount of the capital stock of a corporation is usually determined by its charter, and as stated elsewhere, can be increased or diminished only by due process of law. Its real value, however, will depend in part on the profits and losses of the corporation, past and prospective, and in part upon the amount of the accumulated profits, if any, which are reserved as an additional basis for profit making."

To the same effect see *Bank v. Assessors* (La.), 18 South. 753.

In *Christenson v. Eno,* 106 N. Y. 97, 60 Am. Rep. 429, the court says in its opinion at the bottom of page 430: "The cap-

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Brief for appellee.

ital of a corporation consists of its funds, securities, credits and property of whatever kind which it possesses." See also *People v. New York Tax Commissioner,* 23 N. Y. 194; *Weatherly v. Baker,* 35 N. J. Eq. 501; *Wells v. Canal Co.,* 64 N. W. 72; *Union Trust Co. v. Coleman,* 12 L. R. A. 762; *Foster v. Stephens,* 13 L. R. A. 166.

As said by Chief Justice WHITFIELD in the case of *Hazlehurst Oil Co. v. Decell, supra:* "If, in assessing the capital stock of a corporation, the tax is assessed on the market value of the corporation and not the amount paid in, how can it be that the privilege tax shall be held to be based on the capital stock paid in and not on the capital where the larger word capital is used?"

J. B. Stirling, attorney-general, for appellee.

This record utterly fails to show that the value of the oil mill plant is below $30,000. The only way this could have been shown would have been by the introduction of testimony to show the market value of the plant, and if there were no demand for oil mills in the market, then by showing that by reason of depreciation of the oil mill building its real estate and machinery, the value had fallen below $30,000.

The fact that a corporation is not paying a dividend is not a circumstance of much value in determing the value of the plant. If so, railroads and other corporations would invariably escape taxation either *ad valorem* or privilege.

Under the theory advanced by appellant an oil mill unquestionably worth $50,000, but upon which $50,000 had been borrowed and improvidently spent by its officers would not be subjected to taxation, for its stock would thus be rendered valueless. The property of corporations is assumed to be worth what is put into them, unless by time or use the assets are depreciated, and if this is depended upon to show depreciation it must be shown clearly and unequivocally, and bring the value below the stipulated amount.

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Opinion of the court.

HARPER,* Special Judge, delivered the opinion of the court.

The Crenshaw Oil Company operates an oil mill. Its capital stock exceeds $30,000, which amount it invested in the oil mill business. But for some reason the company did not succeed, and the value of its capital stock greatly depreciated. In the fall of 1907 the sheriff of Panola county sued the oil mill company for $350 for failure to pay the privilege license of $175, assessed by Code of 1906, § 3801: "On each cotton seed oil mill, where the capital exceeds thirty thousand dollars, and less than seventy-five thousand dollars, $175." The case was submitted to the judge in lieu of a jury, who according to the special bill of exceptions found as follows: "The evidence shows that the amount originally invested in the oil mill business by plaintiff company exceeded $30,000. The evidence, which was undisputed, further showed that the aggregate value of all the property, real, personal, and mixed, of said company, now engaged in the oil mill business and so engaged on the 1st day of May, 1907, was $21,000. In this state of facts the court held the plaintiff liable to the privilege tax, holding that the amount of money originally invested in the business is what is meant by the word 'capital,' and not what was the fair market value of the property at the taxing period, and held that the capital was not affected by depreciation of value of the property which represents the original investment"—and accordingly rendered a judgment against the oil mill company for $350.

We are of the opinion that the measure of the liability of the appellant is the value of the assets used and invested in the business during May of the year in which the tax is collected, and not the value of the assets originally used and invested in the business. We think this question is virtually settled by the case of *Hazelhurst Oil Company v. Decell*, 83 Miss. 346, 33

* One of the judges of the court having recused himself in this case, William R. Harper, Esq., a member of the supreme court bar was appointed and presided in his place.

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Statement of the case.

South. 412. Under the language of this statute we do not think that the value of the capital stock is material or relevant; but it is the value of the capital, or property, or assets invested and used in the business, as distinguished from the capital stock.

The judgment of the court below is reversed, and the cause remanded, to be proceeded with in accordance with this opinion.

Reversed.

FRANK FINKLEA v. STATE OF MISSISSIPPI.

[48 South. 1.]

1. CRIMINAL LAW AND PROCEDURE. *Evidence. Burglary.*

In a prosecution for burglary, a conversation between a witness and the accused wherein the defendant was informed that he was charged with the crime and that his wife was responsible for the charge is inadmissible in evidence.

2. SAME. *Same. Ill feeling between husband and wife.*

In a criminal case evidence of ill will between the accused and his wife is inadmissible.

3. SAME. *Witnesses. Husband and wife. State should not call defendant's wife.*

In a criminal case it is improper for the state to call the wife of the defendant as a witness, and compel him in the presence of the jury to object to her as being incompetent.

FROM the circuit court of Noxubee county.

HON. ROBERT F. COCHRAN, Judge.

Finklea, appellant, was indicted, tried for and convicted of burglary and appealed to the supreme court.

On the trial in the court below the prosecuting lawyer called the wife of defendant to the stand as a witness for the state and, in the presence of the jury, caused defendant to object to

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Brief for appellant.

her as being incompetent to testify. The wife was not permitted to testify.

One Sennett, a witness for the state, was permitted to testify, over defendant's objection, that before defendant's arrest witness informed the accused that he was charged with the crime, and that his wife was responsible for the charge, and the witness further so testified that there was at the time considerable ill feeling between defendant and his wife.

After conviction the defendant insisted that the course pursued was violative of his rights and entitled him to a new trial.

Defendant also assigned as a ground for a new trial the disallowance of his objections to Sennett's testimony.

J. E. Rives, for appellant.

The prosecution, in its zeal to convict defendant and to prejudice the minds of the jury against him not only entered the name of the wife upon the indictment as a prosecuting witness against himself, but actually brought her into the court room, had her face the jury and take the witness stand against her husband.

Can it be doubted that the effect of this proceeding was to unduly bias the jury against this defendant?

It is said that defendant had a legal right to object to her testifying. So he did, but that did not give the prosecution a right to place defendant in the embarrassing position of being forced to protest before the jury against such an unfair proceeding.

The prosecution could very well afford to have the court sustain an objection after it had in this manner forced upon the minds of the jury that the defendant was conscious of his guilt and afraid to permit his wife to testify against him.

When attention was called to this unlawful proceeding, the trial court only asked "Do you object?" which amounted to telling the jury that "if defendant is afraid for his wife to testify,

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Brief for appellee.

and feels constrained to object, I will have to sustain the objection on technical grounds."

In order to further unduly inflame the minds of the jury against defendant and to create a false sympathy for his wife, the witness Sennett was asked and permitted to testify as to conversations had with defendant in reference to defendant's wife, and was permitted to testify as to statements made by defendant evincing great anger towards his wife, which had nothing whatever to do with this case.

H. H. Brooks, Jr., and *George Butler,* assistant attorney-general, for appellee.

The appellant had a right to object to any testimony offered against him, and the court promptly sustained the objections made by him to his wife's competency. The woman did not testify against the appellant in any manner whatsoever. She did not even take the oath administered to witnesses.

No one would seriously contend that testimony would be incompetent, which shows that a defendant would attempt to bribe a witness, and if it is a circumstance of guilt, that a defendant would attempt to bribe a witness, why, then, is it not a circumstance to show that the appellant said, in the presence of witnesses, who advised him of his wife's accusations, that he wished he had killed her?

Sennett testified that on the 5th or 6th day of June, he heard the accusations made against appellant, and that he, together with two or three friends, went down to talk to appellant, at his brother's house, and that he told Finklea that he was charged with "knowing about the Mashulaville robbery," and he testified further, that it was fifteen or twenty minutes before he would answer the charge, and that after the charge had been made, to use the exact words of Sennett "he paled up a great deal, the color all left his face, seemed excited, trembling and nervous, and seemed to be very much excited." This is a cor-

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Syllabus.

roborative circumstance, which the jury had a right to consider in connection with the direct testimony.

WHITFIELD, C. J., delivered the opinion of the court.

The testimony of the witness, Sennett, as to the conversation between him and the defendant about the defendant's wife was clearly incompetent in any view. The only effect it could have was to have inflamed the jury against the defendant. We think, also, that it was very improper to have introduced the wife of the defendant as a witness against him. She was, of course, manifestly incompetent, and her introduction, under the circumstances of the case, may have had a damaging effect on the jury.

We, however, do not reverse the case for this; but the first error is fatal, and for that reason the judgment is reversed, and the cause remanded. *Raines v. State,* 81 Miss. 489, 33 South. 19; *Thompson v. State,* 84 Miss. 758, 36 South. 389.

Reversed.

AUGUSTINE SPENGLER ET AL. v. STILES-TULL LUMBER COMPANY.

[48 South. 966.]

1. CONTRACTS. *Construction.*

In construing a contract all of its provisions must be considered.

2. SAME. *Contemporaneous construction by parties.*

The contemporaneous construction, placed on an instrument of writing by the parties, is entitled to much weight in determining its intent and purpose.

3. SAME. *Assignment. Building agreement.*

A person who contracts to erect a building for another has the right to assign the money due or to become due to him from the owner on the contract.

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Syllabus.

4. SAME. *Same. Assent of debtor. Necessity.*

The assent of the owner to an assignment by a building contractor of the money due and to become due on the contract is not essential to the validity of the assignment.

5. MECHANIC'S AND MATERIALMAN'S LIEN. *Assignee of contractor. Subcontractors. Materialmen. Laborers. Code* 1906, § 3074. *Priority of liens.*

Under Code 1906, § 3074, giving to subcontractors, materialmen and laborers a lien on the amount due by the owner to the contractor upon their giving notice to the owner, an assignee of the principal contractor has the prior right to the fund as against subcontractors, materialmen and laborers serving notice after the assignment.

6. SAME. *Assignment of principal contract. Effect.*

Where a building contractor transferred to a third person the balance due under the contract to secure advancements to aid in the construction of the building, and thereafter the owner paid the sums due on the contract to the assignee, the transfer was an assignment of the funds due and to become due under the contract, but not of the contract itself, and the assignee occupies no relation towards persons furnishing material and labor in the construction or completion of the building.

7. SAME. *Same.*

That the assignee of a building contractor, to whom the balance due and to become due from the owner had been transferred, consented to materialmen and laborers furnishing material and labor in the construction of the building did not affect his rights under the assignment.

8. SAME. *Same.*

The right of a subcontractor, materialman or laborer, under Code 1906, § 3074, to a lien on the amount due from the owner to the principal contractor on giving notice to the owner as provided in the statute, is defeated by a *bona fide* assignment by the contractor of the balance due and to become due under the contract, made before the service of such notice, although the assignee did not give them notice of the assignment.

9. SAME. *Same. Contractor's outside creditor.*

An assignment by a building contractor of the balance due and to become due under the contract for a debt due to the assignee from the assignor, not growing out of the construction of the building, is good as against subcontractors, materialmen and laborers subsequently serving notice on the owner.

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Brief for appellants.

FROM the circuit court of Madison county.

HON. WILEY H. POTTER, Judge.

The Stiles-Tull Lumber Company and others, appellees, were plaintiffs in the court below; Augustine Spengler, and another, appellants, doing business under the copartnership name, A. & S. Spengler, were defendants there. From a judgment in plaintiffs' favor defendants appealed to the supreme court.

The opinion of the court in response to the suggestion of error fully states the facts.

Brunini & Hirsh, for appellants.

The principal question for determination is:

Has one, to whom a contractor has given a written assignment of moneys due and to become due under a contract for the construction of a building, and who has given notice of such assignment to the owner of the building, a right to such moneys prior to the rights of subcontractors and material men who, thereafter, give such owner notices of their claims against the contractor or materials furnished for, or labor performed on, the building?

It is apparent that Code 1906, § 3072, applies where the owner does not let the entire contract to one person, but gives, to illustrate, the brick work to one person, the woodwork to another, the plastering to a third, the roofing to a fourth and the painting to a fifth. In such case all are original contractors and not subcontractors; and, under the code section, each has a concurrent lien.

Whatever claim appellees have to the fund in court must be asserted, if at all, under Code 1906, § 3074, because Jaffray was the contractor while appellees were subcontractors and submaterial men.

Appellants, A. & S. Spengler, were not the assignees of the contract but were simply the assignees of the money due and to become due under the contract. They therefore did not stand in the same relation to the subcontractors, appellees, as did the

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contractor Jaffray. If the assignment to appellants had embraced the contract, then they would have stood, so to speak, in the shoes of Jaffray, and appellees would undoubtedly have had a prior right to the fund in court.

In placing an interpretation upon our law by the aid of decisions of the appellate courts of other states, it will be well to observe that while in the main the statutes of the various states are the same in general policy yet, in many essentials, they differ widely. Judicial precedent is serviceable in furnishing canons of interpretation and analogies to aid and direct judicial inquiry; but when the statutes are essentially different its assistance extends no further. The inquiry at last is, in every case in any state, what is the legislative intent as expressed in the statute of the state. 20 Ency. Law (2d ed.), 268.

An examination of Code 1906, § 3074, will disclose the fact that the subcontractor or sub-material man has no lien nor has he any way of creating one. All that he can do to protect his interest is to give notice in writing to the owner of the building stating the amount due him by the contractor for work done on, or materials furnished in, the building; and this notice thereupon will "stop" any amount in the hands of the owner due to the contractor. It will be observed that the subcontractor is given no lien on the property. Until the subcontractor serves the owner with the specified notice the subcontractor remains merely an ordinary creditor of the contractor. The owner can disregard him absolutely until the notice is served.

Our statute on this subject is the same as what is known as the New York system, which is distinguished from the Pennsylvania system, which latter system gives the subcontractor or sub-material man a direct lien. The plan adopted in New York does not secure to any one except the original contractor an absolute lien on the property for the whole sum due, but by a species of equitable subrogation allows the subcontractor or sub-material man to give a written notice to the owner stating the particulars of the unpaid claim and requiring the owner

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Brief for appellants.

thereupon to retain such funds as were in his hands belonging to the contractor to abide the results of proper proceedings. 27 Cyc. 89. Under statutes which follow the Pennsylvania system a subcontractor or sub-material man is entitled to a direct lien for what he has done or furnished without regard to any rights of the contractor. 27 Cyc. 90.

From the foregoing it will be perceived that the Mississippi statute law on the subject is fashioned after and similar to the New York system. In some of the states it will be found that at one time the New York system prevailed, and at another time the Pennsylvania system was in force; hence, in reviewing the decisions of our sister states it is well to note the foregoing.

We refer to the following decisions of the New York appellate courts throwing light upon the matter: *Stevens v. Ogden,* 130 N. Y. 182, 29 N. E. 229; *Brill v. Tuttle,* 81 N. Y. 454, 37 Am. Rep. 515; *Conselyea v. Blanchard,* 103 N. Y. 222, 8 N. E. 490; *Lauer v. Dunn,* 115 N. Y. 405, 22 N. E. 270; *McCorkle v. Herrman,* 52 Hun, 610, 117 N. Y. 297; *Bates v. Salt Springs National Bank,* 157 N. Y. 322, 51 N. E. 1033; *Beardsley v. Cook,* 143 N. Y. 143, 38 N. E. 109. See also *Binns v. Slingerland,* 55 N. J. Eq. 55, 36 Atl. 277; *Superintendent, etc., v. Heath,* 15 N. J. Eq. 22; *Lannigan's Admr. v. Bradley,* 50 N. J. Eq. 201; *Hall v. Banks,* 79 Wis. 299, 48 N. W. 385; *Copeland v. Manton,* 22 Ohio St. 398; *Board of Education v. Duparquet,* 50 N. J. Eq. 234, 24 Atl. 922; *Tollhis v. James,* 25 Ohio L. Jour. 277.

The lien of a subcontractor is defeated by an assignment of the claim due from the owner of a building erected under contract with the original contractor, made in good faith before the notice of the lien is served, although the owner knew when he paid the assignee that the subcontractor held unpaid claims. *Dorestan v. Kreig,* 66 Wis. 604; *Hall v. Banks, supra.*

Now, let us advert to the decisions of our own state. It has been well settled that a plain interpretation of Code 1906, § 3074, gives no lien to the subcontractor. *Holmes v. Shands,*

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27 Miss. 40; *Rivers v. Mulholland,* 62 Miss. 766. And where a written notice of a claim to the fund by laborers has been served subsequently to the writ of garnishment, the garnishment being first in time is also first in right. *Herrin v. Warren,* 61 Miss. 509. This last cited decision is absolutely decisive of the question here in issue. If the notice by garnishment be good as against "stop" notices of laborers upon what reasoning can it be held that an assignment with notice is not good as against a "stop" notice of a subcontractor?

We cite the case of *Peck-Hammond Company v. Williams,* 77 Miss. 824, 27 South. 995, as also decisive of and controlling this issue. The facts in this case are in substance as follows: One Wedgworth was a contractor having charge of the erection of a municipal school building, and when he had halfway completed the building there remained only about $8,000 due to him by the municipality on the contract price. Wedgworth then executed an assignment of all moneys due and to become due to him under the contract, in favor of one Mrs. Williams in settlement of certain debts due to Mrs. Williams for material furnished by her in the construction of the building. Wedgworth continued to construct the building and to draw money from the municipality to pay for labor and to buy material for the unfinished building, and in all other ways he exercised full authority and contested the assignment on the ground that the advertisement by the owner (municipality) in the newspapers had stated that the successful bidder for erection of the building would be required to secure the payment of all labor and material employed in the construction of the building. The right of the contractor Wedgworth to make the assignment to Mrs. Williams was not at all called in question by learned counsel for the Peck-Hammond Company. It seems to have been admitted by counsel for the parties that the assignment would in law be valid against the Peck-Hammond Company if the aforesaid advertisement did not affect its validity. This appellee court held that, as Wedgworth's assignment to Mrs. Williams was shown to be

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Brief for appellees.

valid, the acts of the contractor Wedgworth, after the assignment did not affect its validity. This appellate court held that, the contract with the municipality for payment of labor and material men was intended obviously to operate to protect the owner, the municipality, and in no way affected the right of the assignee, there being no contest between the owner and the assignee.

We know of no law in Mississippi by which assignments of the kind here in controversy are declared to be void or unforceable. There is nothing in Code 1906, § 3074, which prohibits or prevents a contractor from exercising his common law right of assigning what is due him or what is to become due to him. Until our legislature changes the statute law assignments of this nature will continue to be recognized and enforced by our courts.

Appellants secured the assignment to protect them in their advances, gave notice the same day to the owner, and they thereby acquired a prior right to the fund as compared with appellees who served their notices subsequently. While appellants obtained a preference, this was nothing more than what the appellees were severally endeavoring to do when they each filled their notices under Code 1906, § 3074.

Appellants' claim was for money and material which went into the building just as the claims of appellees are likewise for material and labor for the building. Certainly appellants claim must stand irrespective of the assignment and the mechanic's lien law, with equal merit to be paid out of the proceeds for the construction of the building as the claims of appellees. But for the advances made by appellants to the contractor the contractor could not have successfully carried on his work.

H. B. Greaves, for appellees.

The appellees, all of whom are either subcontractors or material men, are attempting to enforce their rights and establish their liens, as directed by Code 1906, § 3074, against any funds of the original purchase price still in the hands of Cameron, the

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owner. In no state of case can the judgment of the court below be disturbed in so far as it relates to the claims of two of the appellees, to wit, the Stiles-Tull Lumber Company and Morrison Brothers. It is to be noted that the amount of money admitted by Cameron to be due to the contractor, including all amounts due both on the original contract, and for extras remaining unpaid at the time Cameron filed answer in this cause in December, was $5,210.62. The total demands of the appellants A. & S. Spengler amount only to $3,715.18. Hence, if the Spenglers be paid in full, there remains a balance of $1,495.44, which balance should be applied, in the order of priority of appellees' notices, to wit: $350.75 to Morrison Brothers and $652.20 to Stiles-Tull Lumber Company; and balance to be then applied to the claim of such of the other appellees as has next priority of notice.

But passing further into the merits of the whole case, I contend that, as the alleged assignment is signed only by one party thereto, J. H. Jaffray Construction Company, and is therefore unilateral, it is in no way binding upon the Spenglers. It is not an absolute, unconditional assignment, since it recites that it is "to secure said sum of $1,000, the amount of said material and said cash advances," etc. The instrument was therefore simply a mortgage, if any thing at all, and should have been acknowledged and filed for record in order to give notice to future creditors of the Jaffray Construction Company who might figure on furnishing material to complete the building.

Although it is admitted that Cameron the owner had notice of this so-called assignment by the contractor to the appellants, yet it must be kept in mind that he never signed the assignment as acquiescing therein, nor did he in writing bind himself to pay over any money to the Spenglers. The record merely shows as follows, "it is agreed that notice of the assignment by the Jaffray Construction Company to A. & S. Spengler was served upon A. P. Cameron on the day of its date." If such be considered a notice to Cameron within the requirements of Code

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1906, § 3074, then it could simply bind money in his hands due to the Jaffray Construction Company to the extent of any then existing claim of A. & S. Spengler for material furnished and used in the erection of the building.

If a copy of the assignment had been read, or even given, to Cameron, which, however, does not appear to be the case, Cameron could only have considered that such amount as was comprehended under the term, "balance due as under said contract," was assigned. And if the contention of appellants,—that the assignment need not be recorded but that the appellees should have in any event gone to Cameron and made inquiry of him,—is correct, then necessarily the extent of information that Cameron could have given would be that the amount due to Jaffray Construction Company on December 13, 1906, had been assigned to the Spenglers, and no more; and since the evidence discloses that on such date little, if anything, was due, then the appellees naturally had the right to ignore the assignment as being of no actual value.

What does the assignment convey? The answer is shown in the words "the balance due us under said contract with said A. P. Cameron." At the time the assignment was executed, December 13, 1906, the foundation alone of Cameron's building had been laid. There is no suggestion in the record that at that time Jaffray for his company had ever collected anything from Cameron; and by the terms of the original contract between Cameron and Jaffray Construction Company only eighty per cent. of the estimated value of the work done was to be paid to the contractor as the work progressed, leaving twenty per cent. to be paid when work was completed and turned over. What would be a reasonable valuation for the cost of laying the foundations of a building the cost of which was to be $25,000 is a matter of conjecture, but $2,500 would, in this case, be a safe estimate. This would be ample security for the $1,000 then due and for advances of $1,500, taking into consideration that

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Brief for appellees.

out of the payments the Spenglers would stand on equal footing with other creditors.

The words, "that may be due us," used in the contract, refer solely to what may be due at the time they are written, and do not comprehend the future, if the intent were to comprehend future time, the additional words, "and to become due," would have been used. If it be supposed that Jaffrays, after having finished the foundation work, had discontinued his work and breached his contract with Cameron, what would the Spenglers' security or assignment have been worth? Surely not the balance of $23,000 named in the original contract as the price of erecting and completing the whole building. It must be held that the assignment, as written, as intended, under the circumstances, to refer only to such balance as was due by Cameron to Jaffrays on the date when it was executed.

But if it shall be held that the language of the assignment refers to funds to become due, as well as to funds already due at the date of the assignment, then appellees will still not be thereby unduly affected, because, as above set forth, the assignment is in effect only a mortgage and appellees were not bound thereby in absence of their knowledge of its existence. *Buntyn v. Shippers Compress Company,* 63 Miss. 94; *Hutchinson v. Sims,* 57 Miss. 628; *Whitney v. Cook,* 53 Miss. 559; and see also 1 Jones on Mortgages (5th ed.), § 12.

An assignment by the vendee of a contract of purchase of land as security for a loan may be regarded as an equitable mortgage. Jones on Mortgages (5th ed.), 147. And see *Alexander v. Berry,* 54 Miss. 423.

Until Cameron accepted the assignment he was not bound to pay any money to the Spenglers. *Bush v. Foot,* 58 Miss. 5; *Savings Association v. Campbell,* 43 L. R. A. 627, 628.

But for the material and labor furnished by the appellees toward the building, the Jaffray Construction Company would never have been able to finish such work as they did, hence it would be highly inequitable for the Spenglers to be allowed to

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Brief for appellees.

profit by an assignment secretly taken covering all money due and all money to become due under the contract. *Farmers, etc., Co. v. Canada, etc., R. Co.,* 11 L. R. A. 704, 745; *Ottey v. Haviland,* 36 Miss. 19; *McAllister v. Clopton,* 57 Miss. 257; *Herron v. Warren,* 61 Miss. 514; *Bohn v. Kountz,* 12 L. R. A. 36; *Parkhurst v. Railroad Co.,* 81 Am. Dec. 648; *A. A. S., etc., Ass'n v. Campbell,* 43 L. R. A. 622, 627.

But for the case of *Peck-Hammond Company v. Williams,* 77 Miss. 824, 27 South. 995, I would feel not the slightest doubt about the position of appellees. And, in fact, if we analyze this case last cited it will turn out to be no authority against appellees. In the first place, the assignment there read, "all moneys due *and to become due* to him;" and, again, there was in that case an absolute assignment, without any reservation whatever, of benefits. Again, it appears that Wedgworth made two assignments, one considerably later than the other, in favor of Mrs. Williams, the appellee. With the decision in the case last cited staring me in the face, I am not in position to contend that "every assignment in good faith before notice of the lien is served," is not good. I concede the proposition to this extent, namely: if the building is erected and there are a large number of creditors whose claims are all unsecured, and no "stop" notices are served under Code 1906, § 3074, then a valid assignment of all the money then due to pay any one of the creditors would take precedence over the claim of any other creditor seeking to subject such balance, under Code 1906, § 3074. In such a case no one would have obtained an undue advantage, and it is evident that a debtor has a right to prefer any of his creditors.

I do, however, contend that, in this case, if the assignment be considered valid by this court so as to cover moneys to become due after the execution of the assignment, although the assignment on its face simply alleges that it conveys the "balance due," then the assignment must be construed merely as an instrument tending to give the assignee a security for a debt; and, since, this court held that a pre-existing mortgage should be

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Brief for appellees.

postponed and held subordinate to a subsequent mechanic's lien for buildings erected on the mortgaged property, then the assignment in this case must be held subordinate to the demands of appellees.

And I further contend that the action of the Spenglers, in addition to the wording of the assignment, shows conclusively that the Spenglers contemplated fully the very state of affairs which later came to pass, and that they had the same in mind when they accepted the assignment and made contracts with reference thereto; and they are now estopped to set up the assignment as against the demands of appellees.

And, in conclusion, I contend that the entire transaction has resulted in defrauding appellees of their legal rights, hence the judgment of the court below should be affirmed.

W. H. Powell, Huber & Powell, on the same side.

Cameron's building was constructed and completed after the execution of the assignment here in controversy; and, furthermore, almost wholly out of the material furnished and labor performed by the different creditors other than appellants. In short, Cameron's building has been erected with material and by labor of creditors other than A. & S. Spengler, and yet A. & S. Spengler alone receive the benefits.

The Spenglers cannot claim the fund under the assignment, as against appellees, because the assignment must be construed to be a mortgage, and it has never been acknowledged or recorded, and appellees had no notice of the assignment.

Material men are not subcontractors. 11 L. R. A. 743. The assignment to the Spenglers cannot by them be asserted against the material men. 11 L. R. A. 746.

Appellants are estopped from contesting the claims of appellees as appellants knew that material was being furnished to the Jaffray Construction Company by appellees; Jaffray having been authorized by the Spenglers to continue the construction of the building to its completion. 12 L. R. A. 35.

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Brief for appellees.

When creditors furnish material to complete a building they have a priority in claim upon the building for their unpaid demands, as against a claim evidenced by a prior recorded mortgage. 14 L. R. A. 308; 30 L. R. A. 775.

The mechanic's lien law is liberally construed in favor of a lien holder. 20 Am. & Eng. Ency. of Law (2d ed.), 277; *Weathersby v. Sinclair,* 43 Miiss. 189; *Columbus Insurance Co. v. Hirsh,* 61 Miss. 74.

The claims of material men and mechanics are favored by our law, and as to the building the mechanic or material man is entitled to a first lien. *Buchanan v. Smith,* 43 Miss. 101.

All of the appellees became creditors of the Jaffray Construction Company after the assignment in controversy had been made to the Spenglers, with the exception of the Stiles-Tull Lumber Company and Morrison Bros.

We contend, as above set forth, that material men are not subcontractors; and that the assignment to appellants cannot be assertained by them against material men, such as appellees. Furthermore, if the Jaffray Construction Company, the contractor, could not defeat the claim of the material men, then the Spenglers, who as assignees stand in the shoes of the contractors, cannot. The Spenglers cannot be presumed to be *bona fide* creditors, because the assignment was made before the construction of the building and before any material was furnished by appellees. 115 N. Y. 407; 123 N. Y. 269; 107 Cal. 63; 11 L. R. A. 743.

The Spenglers are estopped from contesting the claim of appellees as material men since appellants knew that the Jaffray Construction Company was insolvent and was buying material on credit with which to construct the building, and that such material was making more valuable the security which they held under their secret unrecorded assignment or mortgage. *Kountze v. Berlin,* 12 L. R. A. 35.

Mechanic's lien laws are remedial in their nature and must be liberally construed in favor of material men and laborers.

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20 Am. & Eng. Ency. of Law (2d ed.), 277; *Buchanan v. Smith,* 43 Miss. 90; *Weathersby v. Sinclair,* 43 Miss. 990.

From the moment when notices were served by appellees upon Cameron, all that Cameron then owned, and all that he might thereafter owe under the contract, became bound in his hands in favor of those serving notice. *Columbus Insurance Co. v. Hirsh,* 61 Miss. 74.

The contract between the Jaffray Construction Company and Cameron provided for the construction of the building. The assignment by the Jaffray Construction Company to the Spenglers provided for the completion of the building by the Jaffray Construction Company. In such case, the laborers and the material men who became such after the assignment, should have priority over Spengler in their claims upon the building. 20 Am. & Eng. Ency. of Law (2d ed.), 322.

As between the assignee, for a valuable consideration of a contractor, and the material men who furnish material to the contractor, those material men who furnish material after the assignment are entitled to priority.

WHITFIELD, C. J., delivered the opinion of the court.

The case of *Peck-Hammond Company v. Williams,* 77 Miss. 824, 27 South. 995, controls this case perfectly. The court erred, therefore, in holding the contrary view. The judgment should have awarded the appellants the whole of the value of the amount furnished by them; and the other parties, as correctly held by the court, so far as priority is concerned, would be entitled to the balance in the order in which they served notice upon the owner, as shown by the pleadings and the agreed statement of facts.

Reversed and remanded.

MAYES, J., dissented.

The counsel for appellees filed a suggestion of error, to which the court responded as follows:

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Opinion of the court.

WHITFIELD, C. J., delivered the opinion of the court in response to the suggestion of error.

The case made by the record is briefly this: A. P. Cameron contracted with J. H. Jaffray, who was doing business under the firm name of J. H. Jaffray Construction Company, to build him a residence in the city of Canton, Miss. Jaffray proceeded to carry out his contract. When he completed the foundations, he executed the following assignment to appellants, A. & S. Spengler, of Vicksburg, Miss.: "In consideration of the sum of $1,000 heretofore advanced us by A. & S. Spengler, of Vicksburg, Miss., and further consideration that the said A. & S. Spengler have agreed to advance us certain materials in their line for the construction of the house, or residence, we are building for A. P. Cameron, at Canton, Miss., and the further consideration that they have agreed to extend us a cash credit, not exceeding at any one time, of fifteen hundred dollars, for labor, we, the undersigned, J. H. Jaffray, composing the firm of J. H. Jaffray Construction Company, do hereby transfer and assign, to secure said sum of $1,000, the amount of said material, and said cash advances, unto the said A. & S. Spengler the balance due us under said contract with the said A. P. Cameron for the construction of said building as aforesaid, and direct the said Cameron to pay over the said balance to the said A. & S. Spengler as the payments become due; the duplicate of said contract being herewith attached. Any balance, after paying what may be due the said A. & S. Spengler, shall be paid over to us. Witness our signature on this the 13th day of December, 1906. [Signed] J. H. Jaffray Construction Company." Notice of the assignment was given by appellants to Cameron, the owner, on the day of the assignment. Appellants continued to advance Jaffray material and cash money under said assignment for use in the construction of said building, and Cameron made payments under his contract from time to time to appellants. When the residence was completed, appellants

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claimed there was due them $3,600 or $3,700, as shown by the pleadings and exhibits.

Appellees, who are various subcontractors or material men, not knowing of the assignment to appellants by Jaffray, furnished material and labor to Jaffray in the construction of said buildings, and, not receiving payment therefor, served "stop" notices on Cameron under Code 1906, § 3074, but long after the assignment. It is agreed, for the purpose of this appeal, that the notices are all in proper form, and served in conformity with the provisions of said section. It is also agreed that Jaffray remained throughout in the possession of the work as contractor, and that all the "stop" notices were served upon Cameron, the owner, by appellees subsequently to the execution of said assignment by Jaffray to appellants, and subsequently to the service upon Cameron by appellants of notice of said assignment. When said building was completed, Cameron owed a balance of $5,210.62 under his said contract with Jaffray. Appellants claimed $3,600 or $3,700 of this amount under their assignment, and appellees' claims on said fund aggregate $3,600, so that Jaffray's total indebtedness to appellants and appellees reached a sum total of about $7,200 or $7,300, not enough to pay all in full. Hence this lawsuit, in which appellants contend that they should first be paid in full.

The Stiles-Tull Lumber Company and others filed their suits in the circuit court of Madison county for the purpose of enforcing their rights under Code 1906, § 3074. A. P. Cameron answered, and paid over into court what he claimed to be due under his contract, $5,210.62, and asked that all parties in interest be brought in as parties to the said proceedings. The cases were thereupon all consolidated, and an issue made up between appellants and appellees. A jury was waived, and the case heard by the court. It was further agreed that there was more due appellants by Jaffray under said assignment than the difference of what was due the other appellees and the amount

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paid by Cameron into the court. This admission had the effect of removing all question that had theretofore been raised as to the correct amount due appellants under the assignment.

When the appellants sought to introduce said assignment in evidence, appellees objected to its introduction on the following grounds: (a) Because "said assignment is no more nor less than a mortgage, which has never been acknowledged or filed for record in Madison county, or anywhere else, as required by law." (b) Because "no notice was given to the other parties (appellees) of appellants' assignment." (c) Because "it is irrelevant incompetent, and immaterial, so far as it may affect any rights or interests of appellees to the funds in controversy." (d) Because "no claim can be made thereunder, by virtue of the lien they claim, under the mechanic's lien law of the state." (e) Because "it is not signed and acknowledged, and has not been filed for record." (f) Because "none of the appellees had any knowledge of it." (g) Because "it is purely and simply a mortgage, and, in order to have been valid should have been recorded, or other actual notice given the other creditors." (h) Because "the action of appellants in allowing Jaffray to stay in possession of the job and contract bills, after all improvements were made, prevents them from contesting the claims of appellees."

Upon the foregoing exceptions the court made the following ruling: "The court holds, on the motion to exclude the assignment, that the assignee is entitled to whatever was due on the building to the builder at the time the assignment was made; that after that time the assignee stood in the shoes of the builder, and was only entitled under the assignment to such additional amount as might have been earned by the builder under his contract. The court, however, is of the opinion, further, that the assignment shown to have been served on the owner was sufficient notice of an indebtedness of $1,000, and as to whatever sum the evidence may show was earned by the builder at the time of the execution of the assignment Spengler would be en-

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titled to the amount of the said contractor's labors or material, and as to the other money in court it should be paid to the other parties in the order in which they served notice upon the owner, as shown by the pleadings and by the agreed statement of facts, and that any balance in the court should be paid to Spengler under his assignment. For these reasons, the court overrules the motion to exclude the assignment, and allows it to remain in evidence for the purpose above stated."

Appellants then and there excepted to the ruling of the court. Appellants next admitted that there were no profits in said contract at the time of said assignment, or at the completion of the job. Appellees thereupon moved the court for a judgment for the amount of their claims, to be paid in their priority, with six per cent. interest, to the exclusion of the claim of appellants, and admitted, for the purpose of the motion, that the balance was not sufficient to pay appellants' claim under said assignment in full. The court sustained the motion and gave judgment accordingly.

The purpose of both parties in making the agreed statement of facts, which was made in an irregular sort of way, from time to time, in the course of the trial below, was manifestly that, after such agreed statement of facts had been made further testimony would be adduced by appellants and appellees. But the court's ruling on the effect of the assignment to the appellants had the practical effect of destroying entirely the contention of appellants as to their prior right to the funds in court, and made, of course, the introduction of further testimony unnecessary, especially, when it was admitted that there was more due appellants by Jaffray under said assignment than the difference between what was due the other appellees and the amount paid by Cameron into court. Really the ruling of the court left nothing to be determined in the case except to settle the correctness of the ruling in construction of the assignment, and accordingly the appellant's appeal to this court was taken, the object of the appeal being plainly to have this assignment construed, since,

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as must be obvious, the true construction of this assignment is the pivotal point in the case.

It will be noticed, from the objections made by appellants to the introduction of said assignment, that almost their sole ground of objection was that this instrument was not an assignment, but a mortgage; and, indeed, the chief contention made by learned counsel for appellees in this court, in the oral argument and in their briefs, is that the instrument must be held to be a mortgage, and that consequently, since it was not recorded as mortgages must be to affect the rights of third parties, the appellees here must prevail over this so-called unrecorded mortgage, of which the appellees never had any actual or any constructive notice. This is a totally erroneous view of this instrument. It is plainly nothing else than an ordinary simple assignment. Learned counsel for appellees segregate from the assignment one particular clause in it, to wit, "The balance due us under said contract with the said A. P. Cameron for the construction of said building as aforsaid," without looking to the other provisions of the assignment. Of course, this is not the proper way in which to construe the assignment. All its provisions must be taken in one view, and the purpose of the assignment worked out from the whole instrument, and not a part of it. Counsel for the appellants well say: "The fact that appellants were to continue furnishing material and money for labor; the fact that Mr. Cameron was directed to pay over to appellants the balance 'as the payments became due;' the fact that the balance, after paying what might be due appellants, should be paid over to Mr. Jaffray; the fact that no particular payments were assigned, and others reserved, and many other features about the assignment might be cited to show that the intention of the parties was not to transfer only what was then due, but what was to become due."

Again, it is a well-settled canon of construction that the contemporaneous construction placed upon an instrument by the parties thereto is entitled to very great weight in reaching the

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intent and purpose of the instrument. In the record we find this, an agreed statement of facts: "It is agreed that since the assignment A. & S. Spengler went on furnishing material to the Jaffray Construction Company under said assignment as shown by the record, and that A. P. Cameron, from time to time after the date of said assignment, paid to A. & S. Spengler the aggregate sum of $14,000." This demonstrates that Cameron authorized and acted under this construction of the assignment by paying from time to time to appellants said aggregate sum of $14,000, that Mr. Jaffray acquiesced in said payments made to appellants by Cameron, and that consequently all parties to the instrument put one and the same construction upon the assignment, to wit, that it transferred to the assignees the funds due and to become due. The contention that this instrument, either by its terms alone, or in connection with the contemporaneous construction thus put upon it by all parties to the instrument, constituted a mortgage, is not worthy of serious consideration. It will be further noted that the court below held this instrument to be an assignment, since it overruled all the objections made to its admission on the ground that it was a mortgage, and allowed the assignment to go in evidence. The court below expressly calls it, in its ruling, "an assignment," and refers to the appellants as the "assignees." The error of the court below consisted in holding that the assignees were only entitled to the sum due on the building at the time the assignment was made, to wit, as alleged, $1,000, and that the assignment was invalid to transfer to the appellees any sum thereafter to become due after such assignment. The fact is that the appellants, the assignees, went on furnishing material and money for labor to the extent of $14,000. When the contest arose, the appellants had a just claim for some $3,700, and the appellees had a just claim for some $3,600.

So far as any equities are concerned as to the real merit of these claims, one is just as meritorious, in all respects, as the other, and all that is so earnestly insisted on by the learned

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counsel for appellees, to the effect that the appellants, the assignees, ought not to be allowed to prevail here under their assignment, because of some supposed higher right, moral or equitable, on the part of appellees to said fund, is entirely without foundation. Let it be specially noted that the appellants were not the assignees of the contract as held by the learned judge below. This assignment was not an assignment of the contract of Jaffray, but an assignment of the funds due and to become due under that contract. The language of the instrument places this beyond controversy. It says that in consideration of $1,000 heretofore advanced, etc., and the further consideration that appellants have agreed to advance certain materials, etc., and the further consideration that appellants have agreed to extend a cash credit, not exceeding at any one time $1,500, for labor, therefore Jaffray transferred and assigned, to secure all these things what? His obligation as contractor, with its rights and liabilities? Not at all; but "the balance due us under said contract with the said Cameron, as the payments become due," etc. A plain, manifest transfer of the funds due under the assignment, but no assignment of the contract in any legal sense. All therefore, that is said in the brief of counsel for appellees about the Spenglers not having any higher right than Jaffray, on the notion that the appellants stood in the same relation to the subcontractors and material men, and the appellees, that Jaffray stood in to them, is obviously beside the mark. The assignees had nothing on earth to do with Jaffray's contract to build the house, nor his duties and obligations arising out of that contract; and hence they occupied no relation towards these appellees such as Jaffray the contractor did. They assert a claim under this assignment to the funds due and to become due, and that is the whole extent of this assignment. What, then, is our mechanic's lien law, and what are the respective rights of the appellees and this assignee under that law, and our decisions interpreting that law?

First of all, let it be noted that, in determining any question

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as to the rights growing out of the mechanic's lien, the court is to be critically careful to notice the various statutes of the different states, and the wide differences between them; indeed, the wide differences, at different times, existing between the statutes of the same state on this subject. It is said in 27 Cyc. pp. 89, 90, on this subject: "The protection of the subcontractor and material man, with a just regard to the rights of the owner of the property, has been the subject of much solicitude with most of the legislatures. Two systems seem principally to have been adopted—one known as the 'New York system,' the other as the 'Pennsylvania system.' The one in Pennsylvania, which was the first, where the mechanic who did the work and the material man who supplied the articles used were deemed entitled to protection, rather than a mere builder or undertaker of contracts, made provision that the subcontractor and material man should have a lien for whatever sum might be due to him directly on the building and land upon which it stood, and subordinated the lien of the contractor thereto. The other was the plan adopted in New York, which did not secure to any one, except the original contractor, an absolute lien on the property for the whole sum due, but by a species of equitable subrogation allowed the subcontractor and material man to give written notice to the owner of his unpaid claim, requiring the owner thereupon to retain such funds as were in his hands, belonging to the contractor, to answer the suit of the subcontractor, and securing the same either by lien upon the interest of the owner in the property or a right of action against him; the payment of this sum to operate as a valid set-off against any demand of the contractor. The prominent distinction between the two systems is this: Under the New York system the subcontractor cannot recover more than is due from the owner to the contractor; while under the other system the original contract, or payment to the original contractor, is no defense to a claim of a subcontractor. A clear conception of the distinction between these two systems is necessary to an understanding of the cases, for not only have different

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systems prevailed in different states, but in some instances the legislative history of a single state shows that each of the two systems mentioned has prevailed therein at some period; and many propositions of law laid down with reference to one system are totally inapplicable (or would even be incorrect) where the other system prevails. It seems, however, that the plan of conferring on subcontractors and material men a right of lien for all sums which may be due them, irrespective of payments already made by the owner to the contractor, is passing out of favor, and the tendency in later legislation is to confine their right to what may be owing by the owner to the contractor at the time of notice to him of their claims."

There then follows in this text a very careful consideration of the laws of the different states and the changes made, it being pointed out that in California the Pennsylvania system was first adopted in 1858, but that in 1862 that system was repealed and the New York system adopted, and that this New York system was in turn repealed in 1868, and the Pennsylvania system restored, and that finally the present California statute (Code Civ. Proc. § 1183 *et seq.*) restored again the salient features of the New York system. It will thus be seen that this court must determine this case, not by the statutes of other states, but by the statutes of its own state. Now, what is that statute? It is contained in Code 1906, § 3074, so far as this case is concerned, which is as follows: "When any contractor or master workman shall not pay any person who may have furnished materials used in the erection, construction, alteration, or repairing of any house, building, structure, fixture, boat, watercraft, railroad, railroad embankment, or the amount due by him to any subcontractor therein, or the wages of any journeyman or laborer employed by him therein, such person, subcontractor, journeyman or laborer may give notice, in writing, to the owner thereof of the amount due; and thereupon the amount that may be due by such owner to the contractor or master workman shall be bound and liable in the hands of such owner for the payment of

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the sum so claimed; and if, after notice, the contractor or master workman shall bring suit against the owner, the latter may pay into court the amount due on the contract; and the person giving notice shall be summoned to contest the demand of such contractor or master workman; and the court may cause an issue to be made up and tried, and direct payment of the amount claimed by the person giving notice out of the money so paid into court; or, in case the person giving the notice shall sue the contractor or master workman he shall make the owner a party to the suit, and thereupon the owner may pay into court the amount due on the contract, or sufficient to pay the sum claimed, and costs, and the court shall award the same to the person who may be entitled thereto; and in neither case shall the owner be liable to pay costs; but if the owner, when sued with the contractor or master workman, shall deny any indebtedness sufficient to satisfy the sum claimed, and all costs, the court, at the instance of the plaintiff, may cause an issue to be made up to ascertain the true amount of such indebtedness, and shall give judgment and award costs according to the justice of the case. In case judgment shall be given in favor of the person giving the notice, as hereinbefore provided for, against the owner, such judgment shall be a lien from the date of such notice, on the building, house, structure, fixture, boat, watercraft, railroad or railroad embankment in or upon which the material or labor mentioned in such notice was used or done and may be enforced as in case of liens in other cases provided for in this chapter."

The mere reading of this statute shows that the New York system, and not the Pennsylvania system, is the one which this state has adopted, and which is now in force in this state. See 27 Cyc. p. 101, upon the New York system. The courts of New York have made their system perfectly clear. Under that system it is only the original contractor who has any absolute lien. The subcontractor and the material men have no lien, except from the date on which they give written notices of their claims to the owner, from which date the owner is required to retain

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such funds as were in his hands belonging to the contractor at that time. Under the Pennsylvania system, subcontractors and material men were entitled to a direct lien in all respects equal to the lien of the contractor. The difference between the two systems is as wide as the distance between the poles, on this vital point. In New York, in *Stevens v. Ogden et al.*, 130 N. Y. 182, 29 N. E. 229, that court said on this subject: "The order drawn by the contractor on the owner in favor of E. H. Ogden & Co. for $909.94, being by its terms payable out of a particular fund specified in the order, operated as an assignment, *pro tanto*, of that fund. *Brill v. Tuttle*, 81 N. Y. 454, 37 Am. Rep. 515; *Conselyea v. Blanchard*, 103 N. Y. 222, 8 N. E. 490; *Lauer v. Dunn*, 115 N. Y. 405, 22 N. E. 270. In *McCorkle v. Herrman*, 52 Hun, 610, 5 N. Y. Supp. 881, reversed 117 N. Y. 297, 22 N. E. 948, several persons had performed labor and furnished materials for a building erected by a contractor for the owner. After the work had been done and the material supplied, but before any lien was filed, a judgment creditor of the contractor began supplementary proceedings to collect his judgment, which did not arise out of, and had no connection with, the building contract, and procured the appointment of a receiver. Subsequently the laborers and material men duly filed their liens, and the question arose whether they or the receiver had the prior right to the sum due from the owner to the contractor. It was held at the general term that the lienors had the prior right. In discussing this question the court said: 'The statute gives a creditor a lien against a particular fund upon his doing certain things, and that lien is superior to the claim of any other creditor who has not taken the steps designated by the statutes to secure a lien. The plaintiff, by his appointment as receiver, undoubtedly became vested with all the right, title, and interest of his judgment debtor in and to this fund as of the time when the preliminary order was served. But he gets no greater right than he would have had if his judgment debtor had assigned the same to him on that day,

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and he cannot enforce any other or greater rights than his judgment debtor could enforce. His creditors, by the permission of the statute have been enabled to assert a claim upon his debt due to the judgment debtor, and by reason of the statute, having taken those steps, they have a superior claim upon this debt due to him; and by the transfer of this debt to another person, whether by operation of law, or by a voluntary assignment, the plaintiff's debtor could not deprive the creditors of the right which the law conferred upon them.' The court of appeals reversed the judgment, and in discussing the question, said: 'The real question presented by the demurrer relates to the priority of lien between a judgment creditor of a contractor, who has duly commenced supplementary proceedings on his judgment, terminating in the appointment of a receiver, and laborers and materialmen, who, subsequent to the commencement of the supplementary proceedings and within the time allowed by the law, filed notices of lien to reach the debt owing to the contractor under a contract with the owner of a building for its construction. The section of the lien law (ch. 342, p. 585, Laws 1885) which govern the rights of the lienors in this case prescribed that upon "filing the notice of lien" a lien shall be acquired, etc. The filing of the notice orginates the lien. Anterior to this act the laborer or materialman has no preferential right to be paid for his labor or material out of the sum which is due from the owner of the building to the contractor, but stands in the same position as other creditors. He may subject the debt to a lien in his favor on filing the notice and taking the proceeding prescribed by the act. But if, before this has been done, other creditors, pursuing the usual remedies for the collection of debts, have acquired a legal or equitable right to have the debt applied in satisfaction of their claims the rights is not overreached by liens subsequently filed under the act, unless priority is given by the provisions of the act itself. . . . Which of the claimants have the prior right? We think the plaintiff, as receiver, has

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the superior claim. He stands as the assignee of the claim of the contractor against the defendant, by a title which antedates the filing of the notices of lien. When the liens were filed there was a debt owing by the defendant. If the proceeding instituted by the creditor, whom the plaintiff represents, has been abandoned, the lien would have had priority. But not having been abandoned, and the equitable lien existing when the liens were filed having been converted into a legal title as of a time anterior to the filing of the liens, the right to the debt, as between the plaintiff and the lienors, vested in the former. The plaintiff, we think, stands in as good a position, at least, as if, prior to the filing of the liens, the contractor had in good faith assigned his claim against the defendant to the creditor in the supplementary proceedings as security for his debt. The assignee under such an assignment, according to the general current of authorities, would take precedence over lienors under liens subsequently filed.' The case cited, like the one at bar, arose under chapter 342, page 585, Laws 1885, and is decisive of the question persented. There is no provision in the statute forbidding a contractor to pay his creditors out of the money due or to become due him from the owner, to the exclusion of laborers and materialmen who have not filed liens. This may be an omission; but, if so, it can only be supplied by the legislature, for the courts cannot extend these purely statutory rights beyond the terms of the statute by which they are created. The judgment of the general term should be reversed, and the judgment entered on the decision of the special term, with costs."

The same doctrine precisely is laid down in the case of *Bates v. Salt Springs National Bank of Syracuse,* 157 N. Y. 322, 51 N. E. 1033, in which case the facts are in all respects practically the same as in this case, with the additional fact that there was a clause in the contract by which the contractor was required to obtain a certificate from the county clerk that no liens were unsatisfied of record, etc. The supreme court held that this clause was a protection to the subcontractors, and

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defeated the assignment. The appellate court reversed this finding of the supreme court, and held as follows: "The opinion held that under the mechanic's lien law (Laws 1885, p. 585, c. 342) the laborer or materialman has no preferential right to be paid out of the sum due the contractor until he files notice of lien. In the absence of anything to the contrary in the contract, and before any notice is filed, the contractor may assign to his creditor, in payment of his debt, the whole or any portion of the moneys due or to become due under the contract, and the assignee acquires a preference over a subsequent lienor. This view was based on abundant authority, and is indisputable. *Brill v. Tuttle,* 81 N. Y. 454, 37 Am. Rep. 515; *Lauer v. Dunn,* 115 N. Y. 405, 22 N. E. 270; *McCorkle v. Herrman,* 117 N. Y. 297, 22 N. E. 948; *Stevens v. Ogden,* 130 N. Y. 182, 29 N. E. 229; *Beardsley v. Cook,* 143 N. Y. 143, 38 N. E. 109. The principle to be extracted from the cases is that a lienor obtains no greater right to the moneys payable by the owner than the contractor has, and if the latter has assigned to a creditor *pro tanto* the assignee gains a preference over subsequent liens. . . . Under the doctrine of equitable assignments, it is of no consequence to the relative rights of assignees and lienors that the money may not be immediately payable. Concluding, therefore, as I think we are bound to do under the authority of *Lauer v. Dunn,* that this clause in the contract was for the benefit of the trustees only, it follows that the assignment by the contractor to the Salt Springs Bank of the last payment upon the contract, executed upon the making of the contract, operated as an equitable assignment of the moneys remaining unpaid upon the contract when notice of it was given to the trustees, and gave to the assignee a preference over liens subsequently filed. There is no question as to there being an indebtedness from the contractors to the bank, and, upon notice of the assignment to the trustees, the effect was to bind the moneys remaining unpaid upon the last installment in favor of the bank's claim. There had been an equitable assignment of

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the moneys, which only required for its enforcement a fund to fasten upon and a notice to the holder of the fund. The bank acquired the right of the contractors, who lost their interest in and dominion over the fund, and its assignment was subject to no other equities than such as the trustees may have had against the contractors at the time they had notice of the assignment. It follows, from the view expressed, that the judgment appealed from should be reversed, and a new trial ordered, with costs to abide the event."

Identically the same doctrine is announced with great clearness in the case of *Binns v. Slingerland,* 55 N. J. Eq. 55, 36 Atl. 277. In that case the contractor gave orders or assignments to the various creditors, and the owner did not accept them. Slingerland, a subcontractor, afterwards served "stop" notices upon the owners, and the court said. "It was not seriously contended but that the drawing of the orders worked an equitable assignment of so much of the last payment as they covered, and that they thereby gained, in equity, a priority over the notice served by the defendant herein. *Superintendent, etc., v. Heath,* 15 N. J. Eq. 22; *Lanigan's Adm'r v. Bradley,* 50 N. J. Eq. 201, 24 Atl. 505. And it is equally clear that the rights of such equitable assignees could have been enforced in this court. And if the complainants herein had, as soon as the building was completed and the payment of $1,400 became due from them, deposited the same in this court, and filed a bill of interpleader against the several parties, the holders of those orders would have prevailed over the defendant, Slingerland, claiming under his stop notice of September 12th. They were first in time, and therefore prior in right. . . . The practice of contractors making such preferences by giving orders to materialmen has become so thoroughly familiar to everybody, and has been so frequently before the courts, and their right so to do so thoroughly established, that I must conclude that if the legislature had intended to restrict this right on the part of contractors, they would have done so by express language." So in

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Tollheis v. James, Wkly. Law Bul. (Ohio) 277; *Hall v. Banks,* 79 Wis. 299, 48 N. W. 385; *Copeland v. Manton,* 22 Ohio, St. 398; *Board of Education v. Duparquet,* 50 N. J. Eq. 234, 24 Atl. 922.

Indeed, this view is announced by 27 Cyc. p. 231, as the generally accepted doctrine. At page 231 of 27 Cyc. it is said: "It has been held that if, before the notice or claim of lien is served on the owner or filed, the contractor assigns his claim against the owner, the assignee has the prior right to the fund, and an order given by the contractor on the owner, payable out of what is due or to become due under the contract, operates as an assignment *pro tanto* of the fund, even without any acceptance of the order by the owner." Authorities are cited in support of this view from California, Iowa, New Jersey, New York, Ohio, and Wisconsin, an overwhelming array of authorities. We will not burden this opinion by citing them in detail, as they are set out in 27 Cyc. p. 231, note 98. We have verified these citations, and they fully support the text. On page 232, at the end of this citation of authorities, the editors of Cyc. cite as *contra, Carter v. Brady,* 51 Fla. 404, 41 South. 539; *Beardsley v. Brown,* 71 Ill. App. 199; *Simpson v. New Orleans,* 109 La. 897, 33 South. 912, and *Bourget v. Donaldson,* 83 Mich. 478, 47 N. W. 326; and we remark, in passing, that these authorities cited as *contra* on this page 232 of Cyc. are the very cases cited by learned counsel for appellees, and on which they rely chiefly for support of their view.

Let us look carefully at these authorities a moment. In the case in 83 Mich. 478, 47 N. W. 326, it very clearly appears that the materialmen under that law had a lien equal to the contractor's lien, and it is expressly set out on page 482, 83 Mich., and page 328, 47 N. W., that the statute provided that the materialman or subcontractor had to file his written lien for record in the office of the register of deeds. That case of course, has no application here, where the materialman has no lien, and where the claim for the lien is not required to be recorded. In the

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case in 71 Ill. App., at page 201, it is expressly stated that sec. 24 of the lien law provided that any materialman should have the lien, and on page 202 the court says: "The section provides: (1) That any person furnishing material or labor to the contractor shall have a lien upon the money, bonds, or warrants due or to become due the contractor for the improvement, provided the proper notice is given. (2) There shall be no priority between persons serving such notices. Comparison of this section with others of the act will show a clear purpose to give the subcontractor a lien equal to that of the contractor in all respects." This last sentence disposes entirely of this last case as having no sort of application in this state. In the case of *Simpson v. City of New Orleans,* 109 La. 897, 33 South. 912, it also clearly appears that the materialman was given a lien under the statute, and that Kent, who furnished the materials and had this lien, recorded his claim under the statute. This case, also, has no application to our statute. In the case of *Carter v. Brady,* 51 Fla. 404, 41 South. 540, it appears that Brady, the owner of the land, accepted an order in favor of one W. C. Spencer, on account of the contract of building the house for Brady, on condition, however, that Spencer should complete the building; Brady agreeing, on this condition alone, that he would then pay to Spencer the balance then unpaid on the contract. By section 5 of lien law of the state of Florida (Laws 1903, p. 78, c. 5143), set out plainly in the opinion, it is expressly provided that liens should exist in favor of "any person who shall furnish any building material used in construction," etc. The court said, toward the close of the opinion: "Our statute cannot be subject to the construction that the contractor can at any time during the progress of the building under his contract assign the balance due for such building to a third party and upon the acceptance of such assignment by the owner, a materialman, to whom a lien is given under the statute, will be deprived of all the benefits which the statute has intended to confer upon him." It is too obvious for discussion that, the

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Florida statute giving the materialman the direct lien, the decision of the Florida court was eminently correct on its statute, but is wholly inapplicable to our statute, which gives no such lien.

Surely it ought to be accepted after this citation of authorities, and this analysis of those cited as holding *contra,* which do not hold *contra,* but only hold that. where a lien is given the materialman by the statute, such materialman would prevail over an assignee, that under our statute, which does not give any such lien, the assignee must of necessity prevail over the materialman, who has acquired no lien until after the assignment has been executed and delivered. Out of great deference to the very learned counsel for appellees, and their extreme earnestness in urging their view, an examination will be made now, wholly unnecessary, however, of other authorities cited by them. One of these cases is *Newport Wharf & Lumber Co. v. Drew,* 125 Cal. 585, 58 Pac. 187. What was held there? Just this: "If the contractor is still entitled to demand payment of installments already matured at the time of the notice (that is, notice by the materialman), payment to him is intercepted by the notice; but, if he has already assigned them to a third party, the notice will be inoperative to prevent their payment to such party." This is a direct authority for the appellants. Another case cited by appellees is *Board of Education v. Duparquet,* 50 N. J. Eq. 234, 24 Atl. 922. What does that case hold? "An assignment, in language operating in *præsenti,* of money due and to grow due from a third person, effects an immediate and present transfer to the assignee of a right to demand and receive the money assigned without notice to the debtor; and after such assignment the debtor no longer owes the assignor, but does owe and will owe to the assignee what he would otherwise owe to the assignor." Another direct authority for appellants, and, let it be noted, holding that these appellees were not entitled to any notice of this assignment, a thoroughly well settled proposition. Learned counsel for appellees say that in

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this case, and in several other cases, the building was completed before the assignment was made. But what earthly effect that fact could have upon the validity of this plain common-law assignment, we are unable to see; nor in this case is that fact counted on in the least.

In several cases cited by learned counsel for appellees, to wit, to group them and dismiss them, *Wimberly v. Mayberry,* 94 Ala. 240, 10 South. 157, 14 L. R. A. 305; *Glass v. Freeborg,* 50 Minn. 386, 52 N. W. 900, 16 L. R. A. 335, and *Farmers' Loan & Trust Company v. Canada R. R. Co.,* 127 Ind. 250, 26 N. E. 784, 11 L. R. A. (O. S.) 740, the common principle is announced—all these cases being mortgage cases, and not cases of an assignment at all—that where no railroad is in existence, or where no house is in existence, and a mortgage is given on the railroad or on the land, and the labor, materials, and money of the materialmen and subcontractors gave all there was of value to the property claimed under the mortgage, the mortgagee ought to show a clear and strong superior right in order to defeat the claims of those who in reality brought the claims into existence; the principle being that the mortgage on the railroad in one case, and the mortgage on the land in the other, could not prevail over mechanics and materialmen whose money created in one case the railroad, and in the other the house on the land. In the case of *Bohn Mfg. Co. v. Kountze,* 12 L. R. A. 33 (30 Neb. 719, 46 N. W. 1123), the holding was, as set out at page 36, bottom of second column: "Where a vendee, owing the equitable title, contracts for the erection of a building, upon the express authority of the owner of the legal title, it is but just that the lien of the mechanic should attach to the interest of both vendor and vendee in the premises and be paramount to the lien of the vendor." That is obviously correct, because of the agreement of the owner of the legal title, the vendor. But, besides, the case is from the state of Nebraska, in which as shown in this very opinion, section 1 of the mechanic's lien law pro-

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vides that the materialman should have a lien—another case, therefore, wholly inapplicable under our statute.

Apply to the situation our Code 1906, § 3074, and the general principle of law as to the right to make a common-law assignment, and what do we have? Why, manifestly the assignees here, and appellees, were, prior to the assignment, mere creditors at large, without any lien under this statute given to either. That being the situation, and our statute giving the materialman a lien only from the service of the stop notices, as expressly held in *Herrin v. Warren & Mobley,* 61 Miss. 509, what was there in the law to prevent the contractor from assigning the balance due and to become due to him to the appellants? Why, most manifestly, he had the common-law right to make the assignment, and, if that assignment was duly executed and delivered to the appellants prior to the time when these appellees secured any lien by the service of the stop notices, it is too clear for argument that the assignees must prevail over these appellees, because of the universal equitable doctrine that he who is first in time is first in right. That is this whole case, stripped of all the confusion which has been thrown around it, growing out of the misconception that in some way, or somehow, or somehow else, these materialmen should be preferred to these assignees—exactly why, no one can tell. They had no lien until they served the stop notices. Long prior to that the appellants had the assignment. Both were general creditors, and he who, in the race of diligence to secure himself, first got a claim by their assignment, being first in time, is first in right. That absolutely is this whole case, stripped of all the clouds and darkness which have been thrown about it.

We will, however, because we desire as far as possible to satisfy the learned counsel for appellees of their erroneous view, notice a few other of their contentions. It is complained that the assignees gave these appellees no notice of their assignment. None was necessary. The doctrine is stated thus in *Hall v.*

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Banks, 79 Wis. 229, 48 N. W. 385: "The lien of a subcontractor is defeated by an assignment of the claim due from the owner of a building erected under contract to the original contractor, made in good faith before the notice of the lien is served, although the owner knew when he paid the assignee that the subcontractor held unpaid claims." So in *Copeland v. Manton,* 22 Ohio St. 398, and in *Board of Education v. Duparquet,* 50 N. J. Eq. 234, 24 Atl. 922. The truth is, the case of *Herrin v. Warren,* 61 Miss. 509, is absolutely decisive of this case in favor of appellants under our statutes. If, as said by the New York court of appeals, the legislature intended to forbid assignments in cases of this sort, or to prohibit their obtaining priority as in this case, nothing was easier than for the legislature to put in the mechanic's lien law that sort of prohibitive provision. There is nothing like that in our section 3074, and until the legislature does put it there the contractor has the common-law right to make the assignment, such as was made in this case, and it will be enforced by this court according to the principles governing same.

There are a great many inaccuracies, inadvertent, of course, in the statement of facts by learned counsel for appellees. For example, to run hastily over them, the amount for extras was not $2,300, but $1,463.85; the $9,000 paid by Cameron before any notices were served was paid directly to the Spenglers, not by Jaffray, and by him to the Spenglers. Cameron was notified of this assignment the very day it was made. There is no clear evidence in this record that appellees furnished material with the knowledge and consent of appellants. This is sought to be worked at in a very vague way, from certain checks; but, if it had been clearly proven, it would make no sort of difference as to the rights of appellants. It was the business of the appellees to give notice themselves to Cameron, and not negligently and supinely furnish these materials without the exercise of any sort of diligence on their part. They have only themselves to blame for what they may lose. There is nothing

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that we can find in the record to show that $2,020 were paid to the assignees on an old account. We do not know how this is worked out. It seems pretty clear to us, from the record, that about $55 was the only amount paid on such old account, and that the balance was for material furnished for this very building. What is shown in the record seems to make this pretty clear; but what difference could it make if it were true? Learned counsel for appellees seem to be of the opinion that an assignment would not have been good as against appellees for a debt due the assignee by the assignor, if that debt did not grow out of the construction of this building. This is a wholly erroneous view; and there are other minor inaccuracies which we will not protract this opinion by setting out.

Another proposition of learned counsel for appellees is that Cameron did not assent to this assignment. We think the fact is shown otherwise by the record; it is agreed that Cameron had paid appellants, since the assignment and under the assignment, $14,000. This $14,000 was for money and materials; but what if Cameron had not assented to the assignment by Jaffray to the appellants? Such assent of the debtor, Cameron, was not necessary to give effect to the assignment executed and delivered by Jaffray to the appellants. *Knapp v. Eldridge,* 33 Kan. 106, 5 Pac. 372; *Newbry v. Hill,* 59 Ky. 530; *Roger Williams Ins. Co. v. Carrington,* 43 Mich. 525, 5 N. W. 303; *Garland v. Harrington,* 51 N. H. 409; *Mourton v. Robertson,* 3 La. 439.

We have thus most patiently, carefully, and in detail gone over this case, both as to the facts and law applicable thereto. Out of the very great deference we feel for all the very learned counsel for appellees, it certainly ought to be clear to them, after this review, that they have fallen into what is, perhaps, a popular misconception of the effect of section 3074 of our Code, under our decisions. This section might have provided, if the legislature had preferred the Pennsylvania system, that no assignment should be made by the contractor which would

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be good against the materialmen; but it did not so provide. It might have expressly given the materialmen and the subcontractors, as the Pennsylvania system does, direct liens, equal in all respects to the lien of the original contractor; but it expressly refused to do that. There is nothing in the contract between Jaffray and Cameron stipulating that any such assignment should not be made. In short, this whole case is completely and perfectly disposed of under the statute, by the decision in this state of *Herrin v. Warren & Mobley,* 61 Miss. 509, which has stood from that day till this as the unquestioned law of this state, in construction of our mechanic's lien laws. The learned counsel for appellees certainly did not overlook this case; but it is equally certain that they have wholly failed to give it its full effect and force. To hold any other view than we have in this opinion, on our particular statute, would be to squarely overrule that case. It is idle to indulge in the loose view, in which counsel for appellees seem to indulge, that there is some sort of general spirit or purpose pervading this statute which gives to the appellees a prior right under the statute, under the facts of this case. We apprehend that the legislature, in this carefully drawn section 3074, have fully and explicitly and plainly enacted just the law they wanted—the New York system; and to do what appellees ask us to do in this case would be to read into the section, by judicial legislation, something not only not in it, but something which is in direct conflict with its express provisions, and its declared policy. This, of course, we decline to do.

It follows that the judgment of the court below was erroneous, and the suggestion of error is overruled.

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Statement of the case.

FRANK BINDER v. JOSEPH WEINBERG.

[48 South. 1013.]

PARTY WALLS. *Easement. Grant. Necessity. Code* 1906, §§ 3561–3565. *Rights of owners. Executed license. Estoppel.*

Where under an oral agreement adjacent owners erect on their lots a two-story building with a party wall on the boundary and a common hall-way for the second story over the wall, contemplating that the hall-way should be kept open for passage and to light and ventilate the rooms on the second floor:—

(*a*) The agreement did not create an easement by grant; and

(*b*) An easement of strict necessity is not implied, where, as here, an interference with the right of the complainant to have the hall-way unobstructed is remediable at a reasonable expense; and

(*c*) A deed from one of the parties to a third person conveying his lot "together with all improvements thereon, party wall agreements thereunto appertaining, and easements," does not show an easement when none existed before; but

(*d*) The agreement, erection and use of the building constituted an executed license, and the grantee in the deed is estopped to take one-half of the hall-way and erect a permanent structure thereon, interfering with light, ventilation and passage; since

(*e*) The deed is sufficient to put the party on notice that there were party wall agreements, the full nature and extent of which he was required to ascertain; and

(*f*) The rights of the parties to have the hall-way kept free from obstruction is not within Code 1906, §§ 3561–3566, providing how walls may become party walls, regulating compensation therefor and preventing their removal or impairment in value.

FROM the chancery court of Washington county.

HON. M. E. DENTON, Chancellor.

Binder, appellant, was complainant in the court below, and Weinberg, appellee, was defendant there. From a decree in defendant's favor complainant appealed to the supreme court. The opinion of the court states the facts.

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Brief for appellant

Hugh C. Watson, for appellant.

Whether the wall is a party wall is a question of fact and not of law. 6 Lawson's Rights and Practice, § 2789. Under the facts in evidence, it must be held that the wall here in question is a party wall, since a wall built upon the dividing line of two separate properties, and partly upon each is a party wall. *Weems v. Mayfield,* 75 Miss. 286, 22 South. 892.

Appellant contends that the hallway and common stairway resting upon the party wall, together with the roof overhead and the front and rear ventilators, are a part of the party wall under the plans of the structure as erected and maintained.

In the very nature of the structural plan of the building, and, for that matter, in all buildings of like nature, whatever fixtures rest upon a party wall, whether the same be cross beams, floor sills, roof beams, flues, chimneys, ventilators, party hallways, party stairways or other like structures and conveniences, are dependent upon and become a part of the party wall and must be included within the purview of party wall statute law. The principles here contended for run through the case of *Weems v. Mayfield, supra.* Nor is this all; the parties themselves so considered, built by, acted under, and lived under, this construction of the party wall agreement, and appellee bought with reference thereto.

The construction that the parties to a contract have themselves placed upon it will be of aid to the court in construing a contract which is of doubtful construction. *Ganong v. Brown,* 88 Miss. 53, 40 South. 556; *Turner v. Planters' Lumber Co.,* 92 Miss. 767, 46 South. 399.

Either party to this suit has an easement in the joint or common part of the structure which is enforcible against the other. The fact in evidence shows that there was a party wall, to which was added a common or party hall and that the easement as to all parts of the structure that was to be used in common by both parties exists the same as that of the party wall, and the

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Brief for appellant.

court can enforce such an easement. *Giebel v. Smith*, 23 Atl. 437; *Galloway v. Bennesteel*, 6 N. W. 262.

Appellee is chargeable with actual notice of the plan of the structure by reason of the fact that he had occupied a part of the building as a tenant for a period of five years prior to the date of his purchase.

Appellee is also chargeable with constructive notice of the party wall agreement and the common hall agreement by reason of the stipulations in the deed from Butler to the bank, and in the deed from the bank to him. The stipulations in the deed from Butler to the bank are: "Together with all and singular the improvements thereon situated, the party wall agreements, party ownership agreements thereunto appertaining and the easements and tenements," etc. The stipulations in the deed from bank to appellee are: "Together with all and singular the improvements thereon situated on all of the aforesaid land and all the easements, party wall agreements, tenements, and hereditaments thereunto belonging." If these provisions are not sufficient then the party wall agreement falls within chapter 105, §§ 3561–3565, Code 1906.

Appellee, having acquird the property with such notice, is estopped from changing the structure. *Clark v. Henckel*, 26 Atl. 1039; *Mayes v. Newhoff*, 19 Atl. 827; *Appeal of Cleland*, 19 Atl. 352.

Equity will grant the relief sought by appellant even though the impairment of the easement be small and the loss of appellee be great when the structure is removed. Especially is this true when appellee was notified at the beginning not to build this obstruction which he was then about to begin. For in such a case a mandatory injunction lies. The whole question on this point is so fully discussed in the case of *Krehl v. Burrell*, 10 Eng. Rul. Cases, 307, 314, and the English and American notes thereunder that we do not feel it necessary to go further in the discussion thereof here.

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Brief for appellee.

Percy Bell, for appellee.

Appellant has failed to show an easement by prescription, or by either an express or an implied grant, as to whether the injunction was rightfully dissolved. Even if an easement had been proved, its existence could work no substantial injury to appellant sufficient to warrant the continuance in force of the injunction.

The provisions in the two deeds, referred to by learned counsel for appellant, do not show the grant of an easement. No easement can be created by the mere use of the words "appurtenancies" and "hereditaments" or other general words. *Bonelli v. Blakemore,* 66 Miss. 136, 5 South. 228.

It is well settled that an implied grant of an easement will not be inferred save in cases of absolute necessity. *Powell v. Sims,* 13 Am. Rep. 629; *Turner v. Thompson,* 24 Am. Rep. 497; *Rempson's Appeal,* 39 Am. Rep. 777.

The evidence fails to show that the original agreement between the parties was in writing.

Inasmuch as no representations were made to appellant upon which he has acted to his injury and inasmuch as no interference of a substantial nature has been attempted with any easement of way by necessity, it followed that appellee, Weinberg, is not estopped from setting up his right to accommodate a tenant and to benefit himself while not injuring appellant or infringing upon appellant's rights. It is well established law that to sustain a mandate for an injunction there must be a substantial injury for which damages not nominal will be granted by a court of law. 19 Am. & Eng. Ency. Law (2d ed.), 124; 6 Pomeroy, Eq. Jur. 548; *Hale v. Rood,* 29 Am. Rep. 528.

The measure of damages is the diminution of value. The overwhelming testimony is to the effect that no injury whatever was sustained. An owner may make changes beneficial to himself, if such changes are not injurious to the rights of others. 19 Am. & Eng. Ency. Law (2d ed.), 126.

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Opinion of the court.

The cases cited by learned counsel for appellant are not in point.

WHITFIELD, C. J., delivered the opinion of the court.

The facts in this case are substantially as follows: That complainant and appellee's remote vendor, F. J. Butler, in the year 1900, orally agreed to erect on two contiguous lots a two-story brick building as one structure under one common plan; that this common plan provided, among other things, that over the common boundary line between the lots there should be constructed a party wall, extending the entire length of the structure; that over this party wall there should be a common hallway, extending the entire length of the structure, to be open over the party wall and for an equal distance on both sides thereof; that in the front of the building a stairway was to be constructed, leading up over the party wall, and for an equal distance on either side thereof, from the sidewalk up into the common hallway just described; that at the rear end of the structure there was to be constructed a stairway leading down into the rear of said premises, into an alley on which both of the lots abutted; that on the east side of the party wall, and on the ground floor of the structure, appellant was to have his store, to be occupied by him; that on the west side of the party wall a store was to be constructed to be occupied by the tenants of said Butler, appellee's remote vendor; that the structure was to front to the northward on Washington avenue and its rear to face to the southward towards the alley above mentioned; that on the east side of the common hallway on the second floor of the structure appellant was to have offices and rooms throughout its entire length, while on the west side of the common hallway the said Butler was to have offices and rooms throughout its entire lengh; that in the rear end of said common hallway sewerage and water facilities were to be placed and maintained at the joint cost of appellant and the said Butler; that individual ownership of the two parties aforesaid was to exist in the struc-

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ture so planned up to the party wall, party stairway, and common hallway on their respective lots, but that each of said parties' interest in and to the party wall, party stairways, and common hallway should be burdened with an easement therein, in favor of the other party, created by the party wall agreement, which was to the effect that a party wall was to be constructed as aforesaid up to the second floor of the building, and that on top of and as a part of this party wall there should be a common or party hall, extending for an equal distance on both sides of the party wall, the easement to be in and over each and every part of the party wall, party stairway, and common hallway; that said hallway was to be kept open for the mutual benefit of both parties, this being a matter of necessity, as there were dead walls on the outer boundary lines of both lots, because of adjacent two-story solid-wall buildings; that the only upstairs ventilation and light that the common hallway had was through a rear door and a window at the front thereof; that thus the structure was erected, maintained, and used until the year 1905 by appellant and said Butler, without let or hindrance; that on the 13th day of March, 1905, Butler conveyed his holding to the Citizens' Bank by deed duly recorded, which deed contains the following provision in regard to the party wall agreement, to wit: "Together with all and singular the improvements thereon situated on all of the aforesaid land, and all easements, party wall agreements, and party ownership agreements thereunto appertaining, and easements and tenements," etc.; that simultaneously therewith, on the date last above named, the Citizen's Bank conveyed its holding to Joseph Weinberg, appellee, and others, by deed duly recorded, which deed contains the following provisions in regard to the party wall agreement, to wit: "Together with all and singular the improvements thereon situated, the party wall agreement and party ownership agreements thereunto appertaining, and easements and tenements,' etc.; that at the time of the purchase of the property by appellee the property stood as originally planned and erected, with the plan of

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structure and the common user of the party wall, stairway, and common hallway, and the necessity therefor perfectly apparent to him; that appellee inspected said property and had actual notice of the plan of structure from his having occupied it from the date of the erection thereof unto the date of his purchase; and had constructive notice thereof by the provisions of the two deeds above mentioned; that for more than three weeks after appellee's purchase of said property appellee acquiesced in the uninterrupted use of said common hallway as contemplated by the original plan of structure, and so acquiesced until the beginning of the erection of the obstruction which this suit was brought to remove; that the obstruction complained of consisted of a room built in the common hall to the front of and adjacent to the railing which inclosed the upper end of the stairway leading up from the front, and which room extended in width from appellee's wall to the center of the party hall over the party wall, and in length from the stairway to the front wall of the building, thus taking and closing one-half of the width of the hallway for the length of the room; that at the time of the beginning of the erection of the obstruction appellee was notified not to erect the same, and that if he persisted in so erecting the obstruction he would be enjoined, but notwithstanding this notice appellee went forward with the erection of the obstruction in the common hallway until enjoined by the writ of injunction issued in this suit.

Counsel for appellee does not agree that the statement of facts is correct, as above set out, in that part of it which states "that individual ownership of the two parties aforesaid was to exist in the structure so planned up to the party wall, party stairway, and common hallway on their respective lots, and that each of said parties' interest in and to the party wall, party stairways, and common hallway should be burdened with an easement therein, in favor of the other party, created by the party-wall agreement, which was to the effect that a party wall was to be constructed as aforesaid up to the second floor of the building,

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and that on top of and as a part of this party wall there should be a common or party hall, extending for an equal distance on both sides of the party wall, the easement to be in and over each and every part of the party wall, party stairway, and common hallway; that the said hallway was to be kept open for the mutual benefit of both parties, this being a matter of necessity, as there were dead walls on the outer boundary lines of both lots, because of adjacent two-story solid-wall buildings; that the only upstairs ventilation and light that the common hallway had was through a rear door and a window at the front thereof." But we think that the testimony in the record does substantially show this part of our statement of the facts to be established by the verbal agreement between the original owners. It is true, we think, that the record fails to show the creation of an easement, in the strict sense of that term, by any grant. We do not think the provisions quoted from the two deeds show the grant of an easement, and those provisions could not create an easement, when none had existed before. *Bonelli v. Blakemore*, 66 Miss. 136, 5 South. 228, 14 Am. St. Rep. 550.

Since an easement proper lies in grant, and there is no grant of an easement shown, we do not think the appellant can stand on his contention in that behalf; nor do we think there is any implied grant of an easement on the ground of strict necessity, under the testimony in the case. It is true that the window in the front half of the hallway was obstructed to the extent of one-half of it, and that light and ventilation are both interfered with to some extent thereby; and it is shown that, since the only light the offices opening into the common hallway receive comes from the windows at the two ends of the hallway, there is a serious interference with light and considerable interference with the passageway—the exit and entrance of those ascending the stairway to the common hall. But the testimony is not sufficiently clear and strong, we think, that these difficulties may not be remedied at a reasonable expense on the part of appellee, so that we are disinclined to hold that there was here an implied

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easement of strict necessity. We think further, that there is not sufficient evidence that the original agreement between the parties was in writing. At any rate, we would not disturb the finding of the chancellor on that fact. Nor do we think that appellant's case fails within chapter 105, Code 1906, §§ 3561–3565. On all these points we concur with the learned court below.

But we do think, from the testimony in this record, under the law applicable thereto, that the appellee is estopped, by equitable considerations, from obstructing this common hallway with this new room. It is plain that the original verbal agreement between the parties who built the party wall and the common hallway above and on the party wall, expressly stipulated that each of the parties was to have the use of the entire hallway, that the light and ventilation of that hallway were not to be interfered with by either, and that the plan of the two buildings, as related to the party wall, and also the common hallway, the way in which both were constructed, and the use to which the common hallway was to be put by both, involved a unity of design; that design being that each party should have full use of the whole common hallway, and derive the full benefit of the unobstructed light and air and passageway therein. This is clear from the evidence. The testimony of the appellee himself plainly shows that he had occupied an office in this building for five years as a tenant, from its original construction, and that prior to his purchase he was thoroughly conversant with the plans of this building, and that he knew, when he purchased the building that the wall was a party wall, that the stairway leading up to the hallway was a party stairway, that the stairway in the rear was also a party stairway, and that the hallway, at the time he purchased it, was and had been used all the while and owned as a party hallway, ever since the building was erected; that objection was made to his building this room by Huntzberger, the clerk of Binder, the appellant, Binder not being in town when this new room was started, but that appellee went forward with the

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building of the new room, in the face of positive objections on the part of said clerk; that appellee knew that the new room did block the passageway to a certain extent, and that by reason of the dead walls on both sides of the building the only light and air the hallway got was from the end windows in the hallway; and that the appellee acted on his impression of the law to the effect that he had exclusive individual ownership to his side of the hallway.

It is further evident, from the verbal agreement, that the appellant had put his money into the construction of this common hallway, as well as of the party wall, upon the faith of that verbal agreement that he should have the use of the whole of the common hall, just as his cobuilder should have the use of the whole common hallway, and that it was the purpose of this verbal agreement that this common hallway should be left entirely unobstructed, to be used, according to the agreement, only as a common hallway. The only reason appellee gives for building a new room was that he wished thereby to increase his rent. It was the plain purpose and plan, as shown by the construction and building of the party wall and common hallway, that the common hallway should be so used by both in its full extent, and should not be obstructed in any part of it. On this state of the case we are clearly of the opinion that the appellee is estopped to build this new room. Certainly the right and justice of the case uphold this view. It is also due to be said that whilst the provisions in the two deeds, the one from Butler to the Citizens' Bank, and the one from the Citizens' Bank to the appellee, to the effect that the grantee should have the property conveyed, together "with all and singular the improvements thereon situated on all of the aforesaid land, and all easements, party-wall agreements, tenements, and hereditaments thereunto belonging," were sufficient, whilst not conveying any easement, to put the appellee upon notice that there were party-wall agreements, etc., about this partywall and common hall, the full na-

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ture and extent of which he had nothing to do to ascertain except simply to inquire of the appellant.

We think the cases of *Appeal of Cleland,* 133 Pa. 189, 19 Atl. 352, 7 L. R. A. 752, and *Clark v. Henckel* (Md.), 26 Atl. 1039, fully support this view which view we may also add as an important consideration, is in strict accordance with the contemporaneous construction put upon the verbal agreement by the original parties to the agreement. In the case of *Clark v. Henckel, supra,* the owner of the lot conveyed part of it, and in accordance with an oral agreement with his grantee that an alley should be left between their properties, for mutual benefit, one was laid out, half on the property of each, and used continuously by the owners of the property for thirty-five years. It was held that, the agreement having been fully performed on both sides, neither should enclose the part of the alley which had been taken from his property. It is true that in that case there had been an adverse user for a length of time much beyond the period of prescription; but the court, quite apart from that, holds and says: Now, although the parol agreement would not give a right to the alley, yet in this case it has been fully executed by both parties, each one contributing a portion of his land to make the alley, and it has been used for thirty-five years by the contracting parties, and those who have succeeded to their estates. It is difficult to see how the right of the complainant can be impugned. It has all the elements and requisites of validity. Here is an agreement fully performed on both sides. If any muniment of title were requisite for the protection of the right thus acquired, no one can doubt that a court of equity would decree it."

In the case of *Appeal of Cleland, supra,* the owners of adjoining lots built a single building covering both lots. The only access to the upper stories was by stairs which were altogether on one lot; and it was held that the erection of such building constituted an executed license in the nature of an easement on the part of the owner of said lot, allowing the owner of the other lot

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to use such stairs, and, further, that purchasers of the lot on which the stairs stood, being affected with notice of the license by the mere existence of the building, cannot prevent the owner of the other lot from using such stairs. The court observed further: "The master has found that there was an express agreement between Phelps and Pierce with regard to the use of the stairways now in question. There is sufficient evidence to sustain this in the testimony of the architect, Perry. If this be so, Phelps could not subsequently repudiate or revoke it, after Pierce, in reliance upon it, had consented to the erection of the building in its present form. So far as it is necessary to the plaintiff's case, we affirm this finding of the master. But, as said at the outstart, we do not consider the existence of an express contract essential. The circumstances to which we have referred, of themselves clearly raise an equitable estoppel in favor of the one party and against the other. There is no doubt but that the present arrangement of the building was recognized at the time to be for the mutual advantage of all parties concerned; and, so far as it is of such mutual advantage, this advantage cannot be denied by either party to the other. Pierce, for instance, could not cut off access through the corridors on the second and third floors from the Phelps to the Dickson part, nor *vice versa*. For the same reason the owners of the Phelps part cannot interfere with the free and common use by the owners and tenants of the Pierce part of the corridors and stairways which happen to be upon their side of the property. The building being cast by common consent in its present permanent form, neither party can revoke the arrangement, upon the faith of which the money of the other has been expended. Each and every part is affected with what, in its nature, is a permanent servitude, so long as the building itself stands. It cannot be changed from its present form, nor the right of common access now provided for be interferred with, at the will of either party, but only by the common consent of all. 'A right of this character, while not strictly an easement, is in the nature of one. It is really a permission or

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license, express or implied, to use the property of another in a particular manner or for a particular purpose. Where this permission has led the party to whom it has been given to treat his own property in a way in which he would not otherwise have treated it, as by the erection or construction of permanent improvements thereon, it cannot be recalled to his detriment. Having expended his money upon the faith of it, and not being able to be restored to his original position, equity will not allow the permission to be revoked in breach of such faith. This has given rise to the doctrine of executed or irrevocable licenses. This doctrine obtained an early foothold in Pennsylvania, and has been consistently adhered to ever since.' . . . The defendants are furthermore affected with both actual and constructive notice of the right to which the plaintiff lays claim. Not only were they directly notified of its existence, but they could not use their eyes without having it plainly called to their attention. It was an evident servitude existing over the one building in favor of the other, and arising out of the permanent form in which the building had been constructed. They were thus put upon such inquiry as would have elucidated the facts upon which the plaintiff now justly relies, and are bound thereby."

We think this statement of the law is not only eminently just, but perfectly sound, and covers the case in hand fully. Wherefore the decree is reversed, and a final decree will be entered here, reinstating the injunction and making it perpetual.

Reversed.

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Syllabus.

WILLIS GIVENS v. SOUTHERN RAILWAY COMPANY.

[49 South. 180.]

CONSTITUTIONAL LAW. *Constitution* 1890, *sec.* 193. *Railroads. Master and servant. Fellow-servants. Negligence. Constitution of United States. Am.* XIV. *Laws* 1908, *ch.* 194, *p.* 204.

Constitution 1890, sec. 193, providing that every employee of any railroad corporation shall have the same rights and remedies for injury from the act or omission of the corporation or its employees allowed by law to persons not employees where it results from the negligence of a superior agent or officer, or a person having the right to control or direct the services of the party injured, and when the injury results from the negligence of a fellow servant in another department of labor from that of the party injured or of a fellow servant on another train of cars, or one engaged about a different piece of work:—

(*a*) Only applies to commercial railroads, railroads proper, carrying freight and passengers; since

(*b*) The classification of such railroads is predicated of the inherent danger attending their operation, and if construed to embrace others the section would violate the fourteenth amendment to the constitution of the United States, securing an equal protection of the laws to all litigants; and

(*c*) The employees of such railroad corporations proper can only recover of them when injured by reason of the perils attending their operation; and

(*d*) Hand cars are not more inherently dangerous than other modes of transportation not in any way connected with railroads proper and not used on the tracks of such railroads, and are not within the section; and

(*e*) The statute, Laws 1908, ch. 194, p. 204, purporting to extend the protection of the section to a new class of employees, is prospective and furnishes no relief to an employee injured before its adoption.

2. SAME. *Case.*

Where plaintiff, a laborer belonging to a railroad bridge crew, and his foreman were returning from work on a push car propelled by a lever car under the control of the track section foreman,

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Statement of the case.

and, when nearing the point to which they were destined, the section foreman ordered the speed of the push car to be diminished, whereby the cars were separated, and thereupon the section foreman directed plaintiff to get off the push car and stop it, and plaintiff, while endeavoring to do so, was struck by the lever car and damaged, the injury was due to the gross negligence of the section foreman, a fellow servant of plaintiff, for whose negligence the company was not liable.

FROM the circuit court of Sunflower county.

HON. SYDNEY SMITH, Judge.

Givens, the appellant, was plaintiff in the court below and the railroad company, appellee, was defendant there. From a judgment in favor of the defendant plaintiff appealed to the supreme court.

Plaintiff, Givens, sued the defendant to recover damages for personal injury alleged to have been caused by defendant's negligence.

Plaintiff, a member of the defendant railway company's bridge gang, was returning from work on a push car with Shields, the gang boss. The push car was propelled by a lever car in charge of Sims, the second boss, and other members of his crew. Upon slackening the speed of the lever car preparatory to stopping, the two cars separated, and Sims ordered plaintiff to get off the push car and stop it. While endeavoring to execute the order, plaintiff was struck and injured by the lever car. At the close of the testimony, the court gave a peremptory instruction for the defendant, holding that the case was not within section 193 of the Constitution of 1890, providing that "every employee of any railroad corporation shall have the same right and remedies for any injury suffered by him from the act or omission of said corporation or its employees as are allowed by law to other persons not employees, where the injury results from the negligence of a superior agent or officer, or of a person having the right to control or direct the services of the party injured, and also when the injury results from the negligence of a fellow servant engaged in another department

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Brief for appellant.

of labor from that of the party injured, or of a fellow servant on another train of cars, or one engaged about a different piece of work."

W. S. Chapman, for appellant.

There is a wide difference in purpose and scope of employment between a railroad corporation and an incorporated construction company. A construction company is a kind of quasi-corporation, and belongs to that class of contractors classed as independent contractors, and is so safeguarded by the decisions of various states, that such companies generally escape liability for any act that they may commit in building railroads and certainly are not governed by the same rules that regulate railroad companies. Speaking of these independent contracts in Thompson on Negligence, Vol. 1, p. 614, § 672, Mr. Thompson says: "Several American courts hold that railroad companies are not liable for the unauthorized trespasses of independent contractors whom they employ to construct or repair their railroads or other works, where the relation of such contractors to the railroad company is such that an ordinary proprietor would not be liable in a similar case. It has been held that the fact that, under the contractor, the work is to be executed under the supervision of the chief engineer of the railroad company, does not take the case out of this rule; since this supervision is reserved merely for the purpose of securing direct results and not for the purpose of controlling the contractor in his method of procedure. These decisions seem to involve in many cases, a denial of justice to property owners through or along whose property railways are constructed. Railway companies, in building their roads, employ non-residents of the particular districts as contractors for that purpose. They are here today and away tomorrow. In addition to this, they are often insolvent. What is still worse, they are often composed of mere dummy corporations, organized by the railroad companies themselves for the purpose of escaping liability for wrong done in the construction

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Brief for appellant.

of the road. As soon as these dummy corporations have served their purpose they are dissolved, and property owners who are injured by their trespasses are left remediless."

I think the error of the trial judge lay in not drawing the distinction between these two kinds of corporations. I cannot conceive how sec. 193 of the constitution could be so construed as to take in an *ignis fatuus* corporation like a construction company. The subject matter of the whole section has reference to the *employes of railroad corporations,* and is confined to that class of persons exclusively. The immunity from liability for any wrongs that may be done by construction companies in the construction of railroads has not been interfered with or restricted in an way by the section referred to. If it is contended that the language of the opinion rendered by the chief justice in the case of *Bradford Const. Co. v. Heflin,* 88 Miss. 314, carries out the idea that the employees referred to means only those who are engaged in transporting freight and passengers, that all other employees of a railroad company are not included in sec. 193 of the constitution, and that it is shown in the opinion in the *Heflin case* that it was the intention of the court to exclude employees injured except those running and connected with passenger trains, then the result would be that a considerable number of railroad employees would have no redress in the courts of the state for any wrongs inflicted on them by the negligence, however gross, of those who had the right to command them. It is true that, on page 363, the following language is used: "It manifestly never was the purpose of the constitution makers in said sec. 193 to give to all employees of railroad corporations the remedies therein provided. They meant such employees as were imperiled by the hazardous nature of the business of operating railroad trains. The very ground upon which the United States supreme court all along held that such legislation was constitutional was that the nature of the business of operating railroad cars is inherently dangerous. It would be absurd to hold that there was any inherent danger in

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discharging the duties of ticket agent, or telegraph dispatcher, or many other officers in which employees of railroads are at work. It would be equally absurd to hold that employees of a railroad corporation engaged in the construction of a round house, or in any other work not at all connected with the operation of the cars, were engaged in work inherently dangerous. They would be in no more danger than any other like employee of any other master. In short, the reason which sustains said sec. 193 of the constitution being the inherent danger attending the actual operation of railroad trains, the remedy must be limited to those employees who such danger imperils."

It appears to me that the true meaning of the paragraph just quoted is plainly disclosed by looking to other portions of the said opinion, and the mention therein of dangerous employments which would not include the class of employees contemplated by sec. 193; and also of certain employees belonging to railroad corporations, whose employment would not expose them to any danger whatever. For instance, a construction company or a mining company, or a logging company, or a lumber company might build a railroad, for the purpose of carrying on a separate business enterprise, and the employees of all of them, engaging in the business of transporting lumber by rail or using the tracks for carrying on the business of their employer might be imperiled thereby and the employment considered dangerous, and in reality might be as much as the work done by a real railroad company in handling a train on a track; and yet, the court says that if these things were true the construction company, mining company, logging company, or lumber company would not find any relief given to them under sec. 193 of the state constitution. So, it was held that the evidence in the case of the *Construction Co. v. Heflin* showed that Heflin was the servant of the construction company and not of the railroad company. See 88 Miss. 348 and 363.

The court also say that a certain class of employees of railroad corporations was not included in sec. 193, and mentions

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those certain ones as follows: "A ticket agent, or telegraph dispatcher, or many other officers in which employees of railroads are at work." Also, "employees of a railroad corporation building a round house, or engaged in any other work not connected with the operation of the cars were not included in this section." I contend that the section boss and the hands and a bridge crew under the control of a foreman or chief would be included in sec. 193, and that such employees are therein protected, if through the orders of the ones over them they were injured through the negligence of their superiors.

I think that it was the intention of the court to make a distinction between construction companies and railroad companies, and to show that persons who could recover under sec. 193 of the constitution for injuries caused by the negligence of their superiors were those imperiled by the running of the trains, etc., of railroad corporations, and not the employees of construction companies and lumber companies and logging companies, although the danger to their employees might be of a similar nature, and the duties to be performed were of like kind. Another reason that gives to me an abiding faith that the *Heflin case* does not displace or overrule the *Morris case* is, that this court is not in the habit of overruling its former decisions indirectly, by stating something that seemingly, to some, might appear antagonistic to an opinion already rendered by it, and especially as the opinion in the one case followed so closely upon the heels of the other. In the case of *Morris v. Brookhaven, etc., R. Co.*, 88 Miss. at page 545, the court says, "It is hypercritical and overstrained interpretation to confine the language to the fellow servant who manually nailed on the strips, since it specifically charges that this was done by direction of the chief in command of all." The facts show, in that case, that the captain of the bridge gang directed a push car to be pushed beyond a certain point where he had stationed one of the bridge gang, and that this crew had, under the direction of the captain of the bridge gang, nailed to the sides of the push car strips three feet

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Brief for appellant.

longer than the material on it. So, in the case at bar, it was shown by the evidence of the witness for plaintiff that this bridge gang, captain and all, were employees of the Southern Railway Company in Mississippi, that they were on the tracks of the Southern Railway Company in Mississippi with a push car in front and a lever car in the rear and which lever car could be stopped in an instant and that after a space of twenty-five yards had intervened between the two cars the plaintiff was directed by the captain of the bridge gang to get down and stop the push car; he obeyed the orders of his superior officer, and got down between the two cars and tried to stop it by holding to the back end of the push car, taking the least dangerous position in endeavoring to obey the commands of the captain of the bridge gang. That he was not contributorily negligent is shown by the fact that the lever car could be stopped at once; that there was nothing to obstruct the view between the two cars, and that it was an act of gross negligence on the part of the chief of the bridge crew not to stop the lever car. It is not to be presumed that the court below instructed the jury to find for the defendant on the ground that the plaintiff was guilty of contributory negligence; but that the court believed from the opinion in the *Heflin case* that it overruled the case of *Morris v. Brookhaven, etc., R. Co.*, and that no employee could recover unless he was connected with the running of a freight train or passenger train for injuries inflicted through the negligence of a superior agent or officer. If this construction is narrowed to that point, then a number of employees, who are exposed to dangers daily, and who aid in keeping up the tracks of the railroad corporations, and of looking after bridges that span rivers, are without remedy and are entirely unprotected, and as there is no intimation in the *Heflin case* that the principle and rule laid down in the *Morris case* have been overruled or modified in any manner whatever, I am strengthened greatly in the view I have here presented, which to me seem to be the sensible and reasonable one, and in happy

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accord with salutary legislation and wise and wholesome judicial interpretation of the laws of the land.

I come now to the core of the subject under discussion and that is, how far is the rule extended to include emlpoyees of railroad companies who can recover for injuries sustained by the negligence of a superior under the authorities as held by courts of last resort? Is the rule limited to those employees only who operate or assist in operating and running freight or passenger trains, or does it extend to and take in another class of employees who keep the road in repair and look to the welfare of the public in keeping the bridges and trestles in good and safe repair, and who, in performing these duties, must necessarily use hand cars, push cars and other appliances run on railroad tracks? In the line of employment the section boss who looks after the railroad track must of necessity employ men to do the work and use hand cars along the tracks of the railroad lying within his section. These people are within the zone of danger, although the danger may not be so great as those incurred by one connected with the running of a passenger or freight train. The same may be said in relation to the captain of a bridge gang and his crew whose work may lead all along the railway tracks within the state and he and his crew encounter dangers greater and more frequent than the ones operating a hand car only under a section boss. As, for instance, the case of *Morris v. Brookhaven, etc., R. Co.*, 88 Miss. 539, 41 South. 267, was decided in June, 1906, and it is inferable that the injury was sustained either in the latter part of the year, 1905, or the early part of 1906, and the case at bar, in August, 1907, proving beyond controversy that dangers do exist from the work engaged in and injuries are not infrequently inflicted upon employees of the class referred to through the negligence and carelessness of the superior in charge. See *St. Paul R. Co. v. Artery*, 137 U. S. 507.

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Brief for appellant.

J. L. Williams, on the same side.

This case should be reversed because the court erred in granting a peremptory instruction in favor of the defendant To do this, the court held that sec. 193 of the state constitution, abrogating the fellow-servant doctrine so far as the employee of railroad corporations are concerned, does not extend to a member of a bridge gang engaged in keeping up the bridges on its line of railway, he being injured by being run over by a hand car through the negligence of a person having the right to control or direct his services. But this holding would engraft an exception on the plain language of the constitution. It was the evident intention of the constitutional convention to do away with what this court has aptly styled "the gross absurdity of the extreme application of the old common-law rule as to fellow servants, illustrated in this state in the cases of Lagrone and McMaster," and the constitution sets aside that rule as to every employee of a railroad corporation, where the injury results from the negligence of a superior agent or officer, or of a person having the right to control the services of the party injured. And this provision, being remedial, should be liberally construed in favor of the employee. In the case of *Southern R. Co. v. Cheaves,* 84 Miss. 585, 34 South. 385, counsel for the railway company attempted to have this court read into this section the clause, "while such person is in the exercise of the superintendence intrusted to him;" but the court declined to adopt this view, saying through Chief Justice WHITFIELD: "It would be the most manifest departure from proper construction to give a narrow, restricting interpretation to these plain provisions in our organic law, framed with the view of expanding and enlarging the rights of injured employees, and abrogating in part the harsh rules of the common law on this subject. It has been expressly held that all of these employers' liability acts are, in view of the subject of their passage, to be construed liberally in favor of employees. Labatt's Master and Servant, vol. 2, § 639, through § 663." And yet, the court below has restricted the ap-

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plication of sec. 193, in the case at bar by reading into it this language: "But this shall not apply to employees injured by hand car accidents."

The court below fell into error by misconstruing the language used in *Bradford Construction Co. v. Heflin,* 88 Miss. 314, 42 South. 174, as follows: "This last proposition is entirely distinct from the proposition which we think it is proper to decide in this case, and that is that said sec. 193 of the constitution applies to the employees of railroad corporations proper, engaged as common carriers in the transportation of freight and passengers, and to such employees only when injured while doing work in some manner connected with the use and operation of the railroad." The last part of the above quotation, to wit: "and to such employees only when injured while doing work in some manner connected with the use and operation of a railroad," is the language that controlled the court below, for it held that a section hand or bridge hand was not engaged in work in any manner connected with the use and operation of a railroad, and therefore under that decision, the plaintiff could not recover.

The precise question presented for determination by this court is, was the plaintiff injured while engaged in work "inherently dangerous," or "in some manner connected with the use and operation of a railroad?"

The case at bar is on all fours with the case of *Morris v. Brookhaven, etc., R. Co.,* 88 Miss. 539, 41 South. 267. If the ruling of the court below is correct, however, the *Morris case* was overruled by the *Heflin case.* But if our contention is correct, then the *Morris case* and the *Heflin case* both announce the law correctly and this judgment must be reversed. If the construction given by the court below to the language of the *Heflin case* be correct, then it has placed this court in the awkward position of turning aside to write a few ages of dictum at the same time that they were disclaiming any intention of doing so; for certainly if the court meant to go to the extent that the

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trial court gives them credit for they have made an announcement in the *Heflin case* that was not required in the case there presented.

It is evident that this court in the *Heflin case* followed the case of *Luce v. Railroad Co.*, 67 Iowa, 75, 24 N. W. 680; and that case is based on the Iowa statute, § 1307 of the Iowa Code of 1873, which gives a party the right to recover when such wrongs "are in any manner connected with the use and operation of any railway." And that is certainly as far as the court meant to go in the *Heflin case;* for the court there say: "We decline to anticipate anything. We decide only the case before us," which statement of the court makes it very clear to my mind that they intended to leave open for future decision, when the question should be presented, as to the meaning of the phrase, "in any manner connected with the use and operation of any railroad." *Larson v. Illinois Central R. Co.*, 91 Iowa, 81; *Payne v. Railroad Co.*, 54 Iowa, 223.

The *Heflin case* has recently been explained by *Mobile, etc., R. Co. v. Hicks,* 91 Miss. 273, 46 South. 360, which shows clearly that this court did not mean to overrule the *Morris case* by the *Heflin case,* and did not go so far as to hold that a section hand is not within the protection of sec. 193. That case holds that a section foreman killed by the derailment of a passing train is within the protection of sec. 193 of the Constitution, as construed by the *Heflin case.* Of course the court does not say that the plaintiffs would have been entitled to recover if Hicks had been killed by a passing hand car, for that point was not up for decision, and such an announcement would have been mere dictum. But certainly reason supports our contention, for although the casualties resulting from hand car accidents may not be as numerous, still they are frequent and just as disastrous to those so injured as injuries resulting from the running of trains of cars. And these accidents are frequent and disastrous enough to show beyond cavil that operating a hand car on a railway track is a business inherently dangerous. The *Hicks*

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case is in perfect harmony with all the decisions of the courts of of other states construing statutes similar to our law as it now stands. In the *Morris case* cited above, a member of a bridge gang was held entitled to recover when injured by the running of a push car under direction of a foreman in a manner remarkably similar in all essential respects to the case at bar. And the *Morris case* is in perfect harmony with the *Heflin case* and *Hicks case,* as announced by this court; with the cases above cited and decided by the supreme court of Iowa; and also with the case of *Railroad Co. v. Artery,* 137 U. S. 537; all of said cases construing laws identical with ours, so far as the question presented by this record is concerned.

Percy, Moody & Percy, for appellee.

Appellant does not contend that he was injured through the negligence of the appellee's vice-principal, or that the injury resulted from the negligence of a fellow-servant in another department of labor from appellant's, or from the negligence of a fellow-servant on another train of cars or engaged about a separate piece of work. The contention is that appellant was injured through the negligence of a superior agent or officer or one having the right to control or direct appellant's services. The contention of appellant's counsel is that section 193 of our state constitution of 1890 applies to him, first, because at the time appellant was injured he and the other men were engaged in operating hand cars, and opposing counsel contend that such work was in itself inherently dangerous within the meaning of the aforesaid section of the constitution. And reliance is placed by opposing counsel in the cases of *Payne v. Railroad Co.,* 54 Iowa, 223, 37 Am. Rep. 198; and *Larson v. Illinois, etc., R. Co.,* 91 Iowa, 81, 58 N. W. 1076; these cases construing Iowa Code 1873, § 1307. And learned counsel for appellant contend that section 193 of our Mississippi Constitution of 1890, is applicable, secondly, because, as they say, section 193 applies to all employees of a railroad company engaged in the

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Brief for appellee.

use and operation of a railroad, and that the use and operation of hand-cars is as much the use and operation of a railroad as the use and operation of railroad trains within the meaning of that section, their reliance being based upon *Luce v. Railroad Co.*, 67 Iowa, 75, 24 N. W. 630; and *Railroad Co. v. Artery*, 137 U. S. 507, 34 L. Ed. 747, construing the above mentioned section of the Iowa code. Our answer to the foregoing is that our Mississippi supreme court has construed section 193 of our Mississippi Constitution of 1890 differently from the construction which they contend for. We further contend that even if they were right in their attempted construction of section 193 the appellant is still not entitled to recover.

This court has construed section 193 of our state constitution to apply only to the employees of railroad corporations proper; that is, to employes of railroad corporations engaged in the transportation of freight and passengers; which employees are brought into contact with the dangers incident to the actual operation of railroad trains, and who are injured while doing work in some manner connected with the use and operation of the railroad.

In the case of *Bradford Construction Co. v. Heflin*, 88 Miss. 314, 42 South. 174, this court in effect held that section 193 of our state constitution was limited to such railroads as are sometimes known as "commercial railroads," engaged in the transportation of freight and passengers; and that it was never the intention of our constitution to give protection to any other than to such employees of railroad corporations who were imperiled by the hazard and nature of the business of operating railroad trains. The very ground upon which the supreme court held that such provision was constitutional was that the nature of the business of operating railroad trains is "inherently dangerous." Therefore, "the reason which sustains said section 193 of the constitution being the inherent danger attending the actual operation of railroad trains, the remedy must be limited to those employees whom such danger imperils." This court knew that

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section 193 was framed so as not to render it objectionable to the United States supreme court as being in any way violative of the fourteenth amendment of our federal constitution. For this reason, our court held that when properly construed, section 193 applied to such railroads as were engaged in the transportation of freight and passengers, because this court knew that up to the time when the state constitution was adopted the supreme court of the United States had vindicated such classification upon the ground that the business of such corporations was inherently dangerous, and limited it to the employees of railroad corporations who were engaged in the actual operation of railroad trains because the United States supreme court at that time had only sanctioned such a classification. The case of *Railroad Company v. Artery, supra,* was decided after the adoption of our state constitution, and for this reason this court was evidently of the opinion that our state constitution framers did not have in mind this federal court decision.

In the later case of *Mobile, etc., R. Co. v. Hicks,* 91 Miss. 273, 46 South. 360, this court again construed section 193. The contention of appellees in that case was that the train was derailed through the negligence of the employees in charge of it, and that, as the deceased was engaged in a different department of service from that of the employees on the train causing the injury, section 193 applied, and hence that appellees should be entitled to recover. It was contended by appellant that the statute was made for the protection of those whose duties subjected them to the dangers of railroading, and that even though Hicks, the deceased, was killed through the negligence of a servant engaged in another department of labor in the actual operation of the train, the section did not apply to the case because Hicks was not himself engaged in such business at the time of his death. This court however held that the deceased was plainly out of the class of employees who, under section 193, were exposed to the perils of the operation of railroad trains, and that section 193 was intended to protect the employee, not

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against what he himself may do, but what his co-employees in certain lines of labor are doing. The court distinctly stated that, "the inquiry is not whether he is at the time operating a train and thus exposing other employees to a peril, but whether in the discharge of his duties he is where the negligence of certain employees operating the train may injure him." The inherent danger, considered by the court, was not the danger arising from the use of hand-cars, but the danger arising from the actual operation of railroad trains. In the sphere of Hick's employment as a section foreman, he was required to work along the railroad track, and in addition to the other appliances furnished him for this work his force made use of hand-cars, both push and lever, and if such work, because it was done in the use and operation of a railroad was a "work inherently dangerous," or "work in some manner connected with the use and operation of a railroad," within the meaning of section 193, the same seems not to have been so considered by the very learned counsel for appellant and appellees, or seriously considered by the court in its decision.

The intention of this court, as expressed in the two decisions of *Bradford Construction Co. v. Heflin, supra,* and *Mobile, etc., R. Co. v. Hicks, supra,* was to protect and safeguard section 193 of our constitution, the organic law of our land, and to leave to the legislature the extension of its beneficent provisions to other corporations than railroads as the law-making body might see fit. The legislature of our state evidently so construed the *Heflin case, supra,* because it enacted, subsequently to the decision, Laws of 1908, ch. 194, providing that "every employee of a railroad corporation, and all other corporations and individuals, using engines, locomotives or cars of every kind or description whatever propelled by the dangerous agencies of steam, gas, electricity, gasoline or lever power, and running on tracks, shall have the same rights and remedies for an injury suffered by him from an act or omission of such railroad corporation or others, or their employees, as are allowed by law

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Brief for appellee.

to other persons not employed." We therefore contend that under section 193, as construed in the cases cited, the appellant, Givens, was not an employee of a railroad corporation within the meaning of said constitutional section, and that the evidence fails to disclose that he was injured by an employee of such corporation within the meaning of such section.

Unless this court holds that the operation of hand-cars is a work inherently dangerous within the meaning of section 193, we still contend that the appellant, Givens, is not entitled to recover, even though the court should be of the opinion that he was engaged in work "in some manner connected with the use and operation of the railroad," because it does not appear that Givens was injured while doing work which brought him in contact with the actual operation of railroad trains. In short, our contention is that, even though the appellant may have shown that he belonged to the class of employees to whom the law affords a remedy, yet he has failed to show that the acts which occasioned the injury were of the class of acts for which a remedy was given. See *Smith v. Burlington, etc., R. Co.*, 59 Iowa, 73; *Malone v. Burlington, etc., R. Co.*, 61 Iowa, 36, 65 Iowa, 417; *Pearson v. Chicago, etc., R. Co.*, 47 Minn. 9, 42 N. W. 302; *Jennings v. Great Northern R. Co.*, 1 L. R. A. (N. S.), 696.

We further contend that Givens was not entitled to recover because it does not appear that, at the time he was injured, either he or any of his co-employees were engaged in working for appellee. At the time of the injury, Givens and his co-employees had quit work, and were going into the town of Itta Bena on hand-cars. It is not shown whether these hand-cars were furnished by the appellee for their use. The men were evidently going homeward for their own convenience and not in the work of the railroad company. *Benson v. Chicago, etc., R. Co.*, 80 N. W. 1050.

In view of the fact that the legislature has enacted a law which meets the views of counsel for appellant in their con-

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Brief for appellee.

struction of section 193, and in view of the further fact that the supreme court of the United States has not yet held that the use and operation of hand-cars is a work inherently dangerous, it would now hardly be wise to so construe section 193 as to endanger it.

In conclusion, if the liability of the appellant, Givens, must be established by proof and not by presumption, the judgment of the court below must be affirmed:

1. Because it does not appear that the appellant or any of his co-employees, by whose negligence it is claimed he was injured, were of that class of employees of the railroad company who, in the performance of the duties required of them, are brought into contact with the dangers incident to the actual operation of railroad trains within the meaning of section 193 aforesaid.

2. Because, even though it may be held that the appellant and his co-employees, by whose negligence it is claimed he was injured, were of that class of employees, yet it does not appear that at the time the appellant was injured either he or his co-employees, by whose negligence it is claimed he was injured, were at the time of the injury doing work in any manner connected with the use and operation of the railroad.

3. Because it does not appear that at the time appellant was injured either he, or his co-employees, by whose negligence it is claimed he was injured, were at the time of the injury engaged in any work whatever for the railroad company.

Catchings & Catchings, on the same side.

The testimony makes out a conclusive case of extreme negligence on appellant's part. He and Shields, whom he calls "the big boss," were riding on a car described as a "push car." A gang of co-laborers, together with one Sims (described as the "little boss") were riding on a hand-car described as a "lever car." There was no motive power to the "push car." The lever car was worked by the gang upon it by means of a lever,

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Opinion of the court.

and the push car was propelled by the lever car. The lever car was placed in contact with the push car so that, while they were moving, the push car was showed along ahead of the lever car. When they were approaching the town of Itta Bena, Sims, according to appellant's testimony, told appellant to stop the push car. Appellant's testimony is to the effect that "Shields and Sims instructed me to get down and stop the push car." He testified that he jumped down back of the push car so that he was between the push car and the lever car, and that while endeavoring to stop the push car the lever car ran against and upon him and injured him. His contention is that Shields and Sims were superior officers having the authority to give him the order to stop the push car, and that in obeying their order he was injured, hence that the company is liable to him in damages. It will however be noted that he does not state that Shields or Sims ordered him to stop the car in any explicit way or by any one certain method. His testimony simply is that he was ordered to get off the push car and stop it. He was free to exercise the method whereby he would obey this general order or command. He need not have gotten off in the peculiar and dangerous method adopted by him between the two moving cars. He was clearly guilty of contributory negligence such as should preclude his recovery of damages.

Even if the case had gone to the jury and the jury had found against appellee, the court below would necessarily have been compelled to set such verdict aside and grant a new trial. The contributory negligence of appellant is so obvious that the peremptory instruction in favor of the railroad company was manifestly correct, and the judgment of the court below should be affirmed.

WHITFIELD, C. J., delivered the opinion of the court.

The point most seriously pressed upon us by the learned counsel for appellant is that a hand-car is within the principle of section 193 of the Constitution of 1890. The cases of *Bal-*

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lard v. Cotton Oil Mill, 81 Miss. 507, 34 South. 533, 62 L. R. A. 407, 95 Am. St. Rep. 476, *Bradford Construction Co. v. Heflin,* 88 Miss. 314, 42 South. 174, and *Mobile, etc., R. Co. v. Hicks,* 91 Miss, 273, 46 South. 360, 124 Am. St. Rep. 679, have settled certain propositions beyond further debate in this state. These propositions are as follows: First. That section 193 of the Constitution of 1890 embraces alone commercial railroads, railroads proper, carrying freight and passengers, and not logging railroads or mining railroads, etc. Second. That the only reason why section 193 can be upheld as constitutional is, as held by the United States supreme court in repeated adjudications referred to in the three cases, *supra*, that such classification of such railroads proper can be properly maintained only because of the fact of the inherent danger attending the operation of such railroads by the highly dangerous agency of steam; in other words, because such commercial railroads do imperil the lives of their employees, by reason of the inherent danger of the operation of such railroad trains. Third. That even the employees of such railroad corporations proper can only recover against such railroads where they are injured by reason of the perils attending the operation of such commercial railroads.

When we said in the case of *Bradford Construction Co. v. Heflin,* 88 Miss., at page 361, 42 South., at page 182, that "said section 193 of our constitution applies to railroad corporations proper which are engaged in the business of common carriers transporting freight and passengers, and to such employees when injured whilst doing work in some manner connected with the operation and use of the railroads," we meant by the word "railroads" railroads proper—commercial railroads carrying freight and passengers. To our minds the proposition that a hand-car is inherently dangerous is one that cannot be supported on reason or principle. Hand-cars are no more inherently dangerous than other modes of transportation not in any way connected with railroads proper, and not used on the rails of

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railroads proper. We are all clearly of the opinion that a hand-car, therefore, is not within the reason which supports section 193 of our constitution as a constitutional provision not in conflict with the fourteenth amendment to the constitution of the United States. It is plain that the legislature of this state so understood the three cases which we have above referred to, because the legislature of this state in Laws 1908, p. 204, ch. 194, extended the protection of section 193 to a new class of employees, and provided therein that "every employee of a railroad corporation and all other corporations and individuals, using engines, locomotives or cars of any kind or description whatsoever, propelled by the dangerous agencies of steam, electricity, gas, gasoline or lever power, and running on tracks, shall have the same rights and remedies for an injury suffered by him from the act or omission of such railroad corporation or others, or their employees, as are allowed by law to other persons not employed." But this act is prospective, and, if properly within the principle of section 193 of the constitution as to hand-cars, or cars operated by lever power, furnishes no protection to the injury of the person in this case, who was injured prior to the passage of this act.

Learned counsel for appellant, in an exceedingly strong brief, has referred us to many decisions, chiefly in Wisconsin, Minnesota, Texas, Kansas, and Alabama, holding that a hand-car is within the various acts of the legislature in those particular states. But none of those acts in any of those states are couched in the same language as is contained in section 193 of our constitution. The Kansas act is set out in *Union Trust Company v. Thomason,* 25 Kan. 3, and is as follows: "Every railroad company organized or doing business in this state shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees, to any person sustaining such damage." The court in that case held that it embraced hand-cars. That may have been a proper construc-

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tion of the statute, as to which we say nothing; but that statute is not identical with section 193 of our constitution. In the case of *Kansas City, etc., R. R. Co. v. Crocker*, 95 Ala. 412, 11 South. 262, the statute of that state, Alabama (sec. 2500 subd. 5, of the Code of 1886), provided: "When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has the charge or control of any signal, points, locomotive, engine, switch, car or train upon a railway"—and the court properly held that the language, "any person who has in charge or control any car upon a railway," embraced a hand-car. That statute, which is very much like the English employer's liability act, as we have in the three opinions, *supra*, pointed out, is broad enough to cover a hand-car. In the case of *Benson v. Chicago, etc., R. Co.*, 75 Minn. 163, 77 N. W. 798, 74 Am. St. Rep. 444, the action was brought under Laws Wis. 1893, p. 268, ch. 220, which provided: "Every railroad or railway company operating any railroad or railway, the line of which shall be in whole or in part within this state, shall be liable for all damages sustained within this state, by any employee of such company, without contributory negligence on his part . . . while any such employee is so engaged in operating, running, riding upon, or switching passenger or freight or other trains, engines, or cars, and while engaged in the performance of his duty as such employee, and when such injury shall have been caused by the carelessness or negligence of any other employee, officer, or agent of such company in the discharge of, or for failure to discharge his duties as such." All that the court held in that case was, construing that statute, that "or other cars"—that is, other cars than switching, passenger or freight cars—was broad enough to cover a hand-car, which decision we think perfectly sound on that statute. In the case of *Perez v. San Antonio & A. P. Ry. Co.*, from the court of civil appeals of Texas, in 28 Tex. Civ. App. 255, 67 S. W. 137, the act there in question, article 4560*f*, Sayles' Ann. Civ. St. 1897, provided: "Every

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person, receiver, or corporation operating a railroad or street railway the line of which shall be situated in whole or in part in this state, shall be liable for all damages sustained by any servant or employee thereof while engaged in the work of operating the cars, locomotives or trains of such person, receiver or corporation, by reason of the negligence of any other servant or employee of such person, receiver or corporation, and the fact that such servants or employees were fellow servants with each other shall not impair or destroy such liability." The court held in that case that a hand car was within that statute, and that the plaintiff was engaged, in that case in the work of operating a car within that statute, which is not identical with ours. The court thought the words of that statute broad enough to include a hand car. Whether correct or not in its holding, the judgment being, as is noted, by the Court of Civil Appeals, and not the supreme court of Texas, it is sufficient to say that the statute is not identical with our section 193 in its language. The cases, therefore, from Texas, Minnesota, Wisconsin, and Alabama, are not at all controlling with us, because some of the statutes are markedly different from our section 193, and the statutes of Texas and Kansas are certainly not identical.

The state upon whose decisions the learned counsel for appellant chiefly relies is the state of Iowa, and the case which he presses upon us most strongly is the case of *C., M. & St. P. Ry. Co. v. James Artery,* which was first decided by the circuit court of the United States for the Northern District of Iowa, and afterwards affirmed by the United States Supreme Court. See 137 U. S. 507, 11 Sup. Ct. 129, 34 L. Ed. 747. The statute of Iowa in that case construed, first passed in 1862, and afterwards modified by Code 1873, § 1307, is as follows: "Section 1307. Every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employees of the corporation, and in consequence of the willful wrongs, whether

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of commission or omission, of such agents, engineers or other employees, when such wrongs are in any manner connected with the use and operation of any railway, on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding." The language of that statute is markedly different from our section 193, in that it provides for damages suffered by any employee "when such wrongs are in any manner connected with the use and operation of any railway, on or about which they shall be employed." This language is extremely broad and very much stronger than section 193 of our Constitution. The Supreme Court of the United States reviewed in that opinion quite a number of opinions of the supreme court of Iowa, and followed, naturally, the construction put upon that statutue by the supreme court of Iowa, and it is true, added, what it was wholly unnnecessary to add, that this was obviously the proper interpretation of the statute; but the United States supreme court expressly sets out in full the facts of said case, which facts show, as it held, that within the meaning of the Iowa statute the injury was "directly connected with the use and operation of the railway." In that case the injured party was sitting on a hand car, holding a shovel on the top of the rail, with a view to cleaning the snow off the top of the rail as the hand car moved, in order to make the railway safe. Under these circumstances under the broad language of that statute, giving the right to an injured employee when the wrong was in any manner connected with the operation and use of any railway, it was very properly held that the plaintiff in that case came within that statute. But the language of that act is markedly different from and far broader than the language of our section 193; and not only is this true, but it is further true that the plaintiff in this case was not injured while doing any work connected with the operation of this railroad proper.

In Labatt on Master and Servant, vol. 2, in an elaborate note, to wit, note 4, p. 2114, the author has collected, with discrimina-

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tion and care, all the cases from the state of Iowa, showing what employees are held to be within that statute, and what not. We call special attention to the case of *Luce v. Chicago, etc., R. Co.*, 67 Iowa, 75, 24 N. W. 600, and other cases cited in the note at page 2118, and *Malone v. Burlington, etc., R. Co.*, 65 Iowa, 417, 21 N. W. 756, 54 Am. Rep. 11, a very carefully considered and correct opinion, in which it was held, as stated in the syllabus that: "An employee of a railroad company, whose duty it is to wipe engines, open and close the doors of an engine house, and remove snow from a turntable and connecting tracks, is not, by by reason of such duties, in any proper sense employed in the operation of the railroad, within the meaning of section 1307 of the Code; and for an injury received, while performing such duties, through the negligence of a co-employee, he cannot recover against the company, under the provisions of said section, notwithstanding he may have other duties to perform which do pertain to the operation of the road. *Deppe v. C., R. I. & P. Ry. Co.*, 36 Iowa, 53, distinguished, as having been decided under a different statute."

We think, after a most careful consideration of this case and all the decisions that have been cited, especially in view of the very careful construction of our section 193 of the Constitution of 1890, which we have made in the three cases first referred to in this opinion, that a hand car in no proper sense be held to be inherently dangerous, within the principle saving section 193 of our Constitution from unconstitutionality. So to interpret our constitutional provision would be to expose that provision, in our judgment, to the condemnation of the supreme court of the United States, on the reasoning of that court in many cases, resting the constitutionality of statutes like section 193 of our Constitution of 1890 on the ground of the inherent danger attending the operation of a steam railroad proper, operated by the highly dangerous agency of steam. The construction which we have heretofore put upon this section of our Constitution was so placed upon it to secure

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to the employees of railroad corporations proper the guaranties which that section provides, and not to extend its spirit and its purpose beyond what we have said they were, in order to avoid any overthrow of section 193, as offending against the fourteenth amendment to the Constitution of the United States. That section, as we have pointed out, in its last clause, authorized the legislature to extend its benefits in a proper constitutional way to other classes of employees, and in the act of 1908, to which we have referred, the legislature has made the attempt to do this. We are, therefore, on this branch of the case, clearly of the opinion that a hand car is not within the principle of section 193 of our Constitution.

The case of *Norfolk & Portsmouth Traction Co. v. A. C. Ellington, Adm'r, etc.*, 108 Va. 245, 61 S. E. 779, 17 L. R. A. (N. S.) 117, is a Virginia case, very ably reasoned, in the course of which WHITTLE, J., speaking for the court, held that an electric street railway was not within their constitutional provision, which was tantamount to holding that it was not inherently dangerous, since their constitutional provision, like ours, rests upon the inherent dangerousness of the operation of steam railroads. The opinion is a masterly one, and this holding is strongly persuasive of the correctness of our view that under our Constitution, from which the Virginia Constitution is taken, a hand car is not inherently dangerous.

The case of *Morris v. Railroad Co.*, 88 Miss. 539, 41 South. 267, is supposed by learned counsel for appellant to have been decided under section 193 of the Constitution; but this is a mistake. That section was not referred to in the briefs of either counsel in that case, nor in the opinion of the court. If that case had been decided under section 193 of the Constitution, it was manifestly overruled by the *Heflin case, supra*, which was decided after the *Morris case*. We do not understand the learned counsel for appellant to contend at all in this case that the plaintiff was not a fellow servant with Sims and the rest of the crew on the lever car with Sims. Manifestly, under the decisions of

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this court for years and years prior to the decision in the *Morris case,* the plaintiff was such fellow servant with Sims and those working with Sims; and it is perfectly clear that the negligence which caused his injury was the gross negligence of Sims in not having the lever car held at a proper distance from the push car whilst the plaintiff was stopping the push car. The decision in the *Morris case* was rendered upon the theory that the act of negligence which injured the party in that case was the act of the superintendent of the gang. This is shown by the language of the opinion delivered by Mr. Justice CALHOON. In other words, it was held in that case that the injured party was injured directly by the negligence of the superintendent who was held to be, in that case, the vice principal of the company.

But this case cannot be aided by the *Morris case,* in that view. The facts of this case, on this precise point, distinguish it plainly from the *Morris case.* Here Givens was not injured in consequence of the order of Sims, ratified by Shields, the foreman of the crew, treating it, as plaintiff's counsel does, as the order of said foreman Shields. It was a perfectly proper order to have been given, and a perfectly proper order to have obeyed, and Givens was not injured because of his obedience to that order; but he was injured manifestly by the gross negligence of Sims, the subboss, a mere subordinate. It was this negligence of Sims, or those with him on the lever car, in not checking up that car, which caused the injury to the appellant; not the order of Shields to the appellant to get off and stop the push car. In the *Morris case* the injury was inflicted by the direct order of the superintendent himself. Here the order of the superintendent had nothing to do with the injury—was a mere condition of the injury, the *causa sine qua non;* but the gross negligence of Sims was the *causa causans,* and his act imposed no liability on the company, since he was a mere subordinate and fellow servant, in our opinion, with the appellant. It is the misfortune of the appellant in this case that his injuries should have occurred at a time prior to the passage of the act attempt-

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Statement of the case.

ing to make the railroad liable for injuries inflicted in the operation of hand cars.

On Const. § 193, and law, as it stood when this injury occurred, and under both Constitution and said laws as they have been interpreted in the three cases, *supra,* cited at the beginning of this opinion, the action of the learned court below was correct, and the judgment is affirmed. *Affirmed.*

BUSTER BROWN COMPANY v. VALLEY DRY GOODS COMPANY.

[47 South. 549.]

1. CONTRACTS. *Construction.*

A construction making a contract fair and reasonable is to be preferred to one making it unfair and unreasonable.

2. SAME. *Exclusive rights.*

A contract by which plaintiff was to furnish defendant its "advertising service" consisting of one "cut" per week, for which defendant was to pay three dollars a week, have the exclusive right to use the same in the city of his residence, and hold the "cuts" subject to plaintiff's order when the contract expired, did not preclude plaintiff from furnishing "cuts" to other parties in said city.

FROM the circuit court of Warren county.

HON. JOHN N. BUSH, Judge.

The Buster, etc., Co., appellant, was plaintiff in the court below; the Valley, etc., Co., appellee, was defendant here. From a judgment in plaintiff's favor for much less than the sum demanded in the suit it appealed to the surpeme court.

The appellee, a dry goods dealer in Vicksburg, Miss., entered into a contract with appellant for its advertising service for a year, consisting of certain cuts, type, etc., suitable to its business. The contract was evidenced by a writing, du[illegible] in these words:

"Gentlemen: For one year, b[illegible]ight a[illegible]

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press at our expense, your 'ad serv[illegible] ... of our Buster Brown cut for each week. We agree [illegible] ... to have the exclusive right at the rate of three dollars per week [illegible] ... sive right to use same in our city [illegible] ... l cuts subject to your order when [illegible] ... After entering into this contract, and [illegible] ... use the cuts, appellant sold other [illegible] ..., furniture dealers in the city of [illegible] ... ths had elapsed and appellee had [illegible] ... allments of the contract price, [illegible] ... 1, being the amount alleged to be due [illegible] ... pellee defended on the ground that under the terms of the ... ract he was entitled to the exclusive use ... wn" advertising matter in the city of [illegible] ... ention of appellant, however, was that the term ... ' in the contract meant that appellee was [illegible] ... ve use of the particular cut sent [illegible] ... d not prevent appellant from [illegible] ... rs in Vicksburg, since appellee [illegible] ... small sum of three dollars a week [illegible] ... ebarred the privilege of furnishing [illegible] ... o other subscribers in that city. [illegible] ... nptory instruction for plaintiff [illegible] ... d a verdict for $16; that amount [illegible] ... nt, and judgment was rendered [illegible] ... tiff's favor.

V. Boothe, for appellant.

e whole controversy centers [illegible] ... the word "exclusive" as [illegible] ... inly and emphatically [illegible] ... ling to all rules of construction [illegible] ... r Brown Company did [illegible] ... city of Vicksburg the [illegible] ... Valley Dry Gods Company [illegible]

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Brief for appellee.

Otherwise appellant, under the meaning given to this word by appellee, and, strange to say, by the learned circuit judge, would have been debarred the privilege of furnishing advertisement cuts to a dramshop, a livery stable, a furniture house or any other, the innumerable kinds of business that make up the commercial life of the city.

Such a construction as that given to this word by appellee in the connection in which it is used is entirely at variance with the meaning of business language, and well nigh shakes the foundations of good common sense. Even the justice of the peace before whom the case was first tried saw the point and promptly gave judgment for plaintiff for the full amount sued for, $121, and this court I believe will approve his finding.

I invite the court to a careful consideration of the evidence of the witness Leyens, from which your Honors will observe that he was permitted to roam at large over the field of oral testimony against the objection of plaintiff, in his effort to overthrow, vary and contradict the terms of this written contract, in plain violation of one of the simplest rules of the law of evidence.

The circuit court should have granted plaintiff's peremptory instruction, and its motion for a new trial.

Hudson & Fox, for appellee.

The art of advertising has developed into a science which is now sold as a commodity; and the merchant who can buy it to best advantage occupies a conspicuous position in the public eye; and is the one who commands the trade. Therefore the contriver who can create the most unique attraction in this respect is a much sought after individual, and his invention always commands a good price; and in order to make the idea more valuable, they sometimes agree to sell the merchant the *exclusive right* to this idea, in their neighborhood, so as to make it more conspicuous; and that was the motive which induced the appellee to make the contract in this case, to wit: The *exclusive*

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Opinion of the court.

right to cuts to be inserted in the weekly newspapers in Vicksburg, advertising men's clothing, boy's clothing, hats, shoes. carpets, and dry goods.

The word "exclusive" in this contract means to the exclusion of all others in Vicksburg. Therefore if the appellant after selling the exclusive right to cuts, to advertise carpets in the city of Vicksburg, the appellant subsequently sold to Rice, a furniture man in Vicksburg, the same or similar cuts of advertising carpets, the appellant violated the most important feature in this contract, to wit: The exclusive right, which was the only inducement that caused the appellee to purchase.

MAYES, J., delivered the opinion of the court.

In Page on Contracts, vol. 2, § 1121, in announcing the principle for guidance in the construction of contracts, it is said: "As between two constructions, each probable, one of which makes the contract fair and reasonable and the other of which makes it unfair and unreasonable, the former should always be preferred." With this rule as our guide, and applying it to the contract in this case, we conclude that it was not the intention of the Buster Brown Company to grant to the Valley Dry Goods Company the exclusive right to anything except the one cut sent it each week. It would be both an unfair and unreasonable deduction, from the words used in the contract, to conclude that for the small sum of three dollars a week it was the intention to contract away its entire service for the whole city of Vicksburg. The contract only means that the one cut a week sent to the Valley Dry Goods Company should be its exclusively, and that the Buster Brown Company should not be privileged to allow any other concern in the city of Vicksburg the use of the same cuts or characters.

The peremptory instruction for plaintiff should have been granted, and, because it was not, the judgment is reversed and cause remanded. *Reversed.*

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ARMISTEAD COLEMAN v. STATE OF MISSISSIPPI.

[48 South. 181.]

1. CRIMINAL LAW AND PROCEDURE. *Code* 1906, § 1045. *Weapons, pointing or aiming at another. Indictment. Duplicity.*

An indictment predicated of Code 1906, § 1045, making it an offense to intentionally point *or* aim a gun, pistol, etc., at or towards another, is not double because it charges that defendant pointed *and* aimed a pistol at another.

2. SAME. *Statutory offenses. Construction. Alternatives.*

Where a statute makes punishable the doing of one thing "or" an other, the person who in one transaction does all violates the statute but once, incurring but a single penalty, so that an indictment may properly allege in a single count that defendant did as many of the forbidden things as the pleader chooses, employing the conjunction "and" where the statute uses "or," without subjecting the indictment to the charge of duplicity.

FROM the circuit court of Covington county.

HON. ROBERT L. BULLARD, Judge.

Coleman, appellant, was indicted, tried and convicted of having unlawfuly and intentionally pointed *and* aimed a pistol at and towards one Macqueen, not in necessary self-defense or in the lawful discharge of official duties, etc., and appealed to the supreme court. The indictment charged that Coleman "pointed and aimed" the pistol. On the trial the court below instructed the jury for the state to convict if they believed from the evidence beyond every reasonable doubt, etc., that defendant "pointed or aimed" the pistol, etc.

Code 1906, § 1045, of which the indictment was predicated is in these words:

1045. (969) THE SAME. *Pointing, aiming a gun, etc.*—Any person who shall intentionally point or aim any gun, pistol, or fire-arm at or towards another, except in self-defense or in the lawful discharge of official duty, shall be punished by a fine of

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Brief for appellant.

not more than five hundred dollars, or imprisonment in the county jail not longer than six months, or both; and any person who shall discharge such fire-arms, so intentionally pointed or aimed, shall be punished by not exceeding double such fine or imprisonment or both; and any person who, by such discharge, shall maim, kill, or injure another shall be punished by imprisonment in the penitentiary not exceeding five years.

Shannon & Street, for appellant.

It will be noted that the indictment charges two offenses—one for pointing the pistol and the other for aiming it. The statute on which the indictment is founded, Code 1906, § 1045, provides that any one who shall intentionally point "or" aim—(not point "and" aim) shall be guilty, etc. So that when the grand jury saw fit to charge defendant with both offenses, to-wit, pointing "and" aiming, it put the burden upon the state of proving both offenses.

There is not a particle of testimony in the record that defendant aimed the pistol at or towards Macqueen. Indeed, it requires a strained construction of the testimony to say that it is sufficient to warrant a conviction on the charge of pointing the pistol at or toward him. About the most favorable testimony for the state on this point is that the pistol was pointed in the direction of Macqueen.

The case of *Rist v. State,* 93 Miss. 841, 47 South. 433, is authority for upholding our contention. There Rist was indicted for arson. And the court, through WHITFIELD, J., says: "The indictment expressly charged that the defendant, "in the nighttime, set fire to and burned," thus charging expressly that both the setting of fire to the house and the burning of the house were in the nighttime, and consequently making it essential to prove both facts as charged."

The only instruction the state asked for or was given authorized the jury to convict if it believed the defendant pointed "or" aimed. It is elementary that this was fatal error, when the

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state caused the indictment to be returned charging pointing "and" aiming, it assumed the burden of proving pointing and aiming, and yet the court told the jury it might convict on testimony proving pointing or aiming.

George Butler, assistant attorney-general, for appellee.

The statute, Code 1906, § 1045, makes it a criminal offense to point or aim a gun at another, not in self-defense, etc., and prescribes the same punishment for the offense whether it be committed by pointing or by aiming. Both pointing and aiming are not necessary elements of the offense. The crime may consist of either or both. Should a person point the pistol he violates the statute and should he aim the pistol he transgresses the law, yet the two are so inter-related that should he do both he incurs but one penalty. A man can not aim a gun at another without pointing it at him and if he points it at him he aims it at him. The distinction is without difference. The offense is committed by the same criminal act.

The indictment was not double as drawn, and if it was the defect was waived by failure to demurrer, or to move the state for election. *Jimmerson v. State,* 93 Miss. 685, 46 South. 948; 1 Bishop, Crim. Proc. § 436, is conclusive of counsel's contention in this case.

FLETCHER, J., delivered the opinion of the court.

We do not think there is any substantial distinction between the terms "point" and "aim," as these words are employed in Code 1906, § 1045. Both words are used in the statute to convey precisely the same meaning; the offense consisting in intentionally so directing a gun or pistol as that its discharge will endanger human life. There is an evident distinction between this statute and the statute on the subject of arson, considered in *Rist v. State,* 93 Miss. 841, 47 South. 433.

Even if there were some real distinction between these practically synonymous expressions, no error was committed in the

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Statement of the case.

trial of this case, since it is settled: "A statute often makes punishable the doing of one thing, or another, sometimes thus specifying a considerable number of things. Then, by proper and ordinary construction, a person who in one transaction does all violates the statute but once, and incurs only one penalty Yet he violates it equally by doing one of the things Therefore the indictment on such a statute may allege, in a single count, that the defendant did as many of the forbidden things as the pleader chooses, employing the conjunction "and" where the statute has "or," and it will not be double, and it will be established at the trial by proof of any one of them." 1 Bishop's Criminal Proc. § 436. *Affirmed.*

BUD BAILEY v. STATE OF MISSISSIPPI.

[48 South. 227.]

1. CRIMINAL LAW AND PROCEDURE. *New trial. Newly discovered evidence. Impeaching testimony.*

A new trial will not be granted for newly discovered evidence impeaching a witness for the state.

2. SAME. *Evidence. Self-serving. Homicide. Flight. Failing to escape having opportunity.*

Proof that while awaiting trial defendant had opportunity to escape but refrained and warned an officer of the escape of a fellow prisoner is self-serving and inadmissible, although the state has offered evidence of defendant's flight immediately after the homicide.

FROM the circuit court of Monroe county.

HON. EUGENE O. SYKES, Judge.

Bailey, appellant, was indicted and tried for the murder of one George James, was convicted of manslaughter, sentenced to the penitentiary and appealed to the supreme court. In view of the opinion of the court a statement of the facts is unnecessary.

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Brief for appellant.

Leftwich & Tubb, for appellant.

Great stress was laid by the state on appellant's supposed flight. It was shown, however, that he only stayed out of the way of the officers until court met, which was less than a month. because he felt that he could not make bond and employ a lawyer; the second day of court, while the grand jury was in session, he surrendered himself for trial. The foundation stone of introducing the flight as competent evidence in prosecution for crime is that it shows conscious guilt in the breast of the accused. Such evidence is competent and may mean much or it may mean nothing. It is of dubious and ambiguous character, and every circumstance that might explain the conduct of the accused ought to be heard by the court and submitted to the jury. Exculpatory facts are admissible to show consciousness of innocence. So eminent an authority as Prof. Wigmore fully agrees with our position on this point. Wigmore on Evidence, sec. 276. Sheriff Jones was placed on the stand to show defendant's flight, but on cross-examination was not allowed to testify that while appellant was in jail awaiting the action of the grand jury, two other prisoners sawed their way out and escaped, and that appellant hastened to the court-house and disclosed the fact to the sheriff, giving him first information of their leaving. Certainly the jury should have been informed that the prisoner after he had surrendered to the authorities had a chance to escape and refused to do so. If such evidence does not show consciousness of innocence and willingness and a gladness to confront a jury of his countrymen and stand his trial, we are mistaken as to what evidence means. We trust this court will take its stand with Wigmore, the greatest living authority on questions of this sort, which is certainly in line with enlightened jurisprudence.

Error was committed by the court below in refusing to grant a new trial on the newly discovered evidence shown at the hearing of the motion for a new trial. This we say, being mindful of the rule that mere cumulative evidence is not ground for a new trial, but the newly discovered evidence is not cumulative. It

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Brief for appellees.

destroys absolutely the evidence of the state's star witness, and if had at that time it would, as far as human prescience can go, have resulted in an acquittal. As sustaining our contention we cite a very recent case of this court, to-wit: *Bates v. State,* 32 South. 915.

George Butler, assistant attorney-general, for appellee.

It is first earnestly insisted that it was fatal error for the court below to exclude proferred testimony of appellant's opportunity and failure to escape jail after it had been shown that he evaded arrest and finally surrendered to the officers.

It, of course, was competent to prove as a circumstance against accused that he evaded arrest, and the correctness of this rule is conceded by counsel.

Of course, the accused might introduce evidence to destroy the significance of his flight and that his flight was due to some other cause than a consciousness of guilt and upon this theory the testimony relative to defendant's financial standing and inability to make bond and procure counsel, was admitted. But we deny the proposition that some twenty or thirty days after the commission of the homicide, after having fled from arrest, after having voluntarily surrendered himself to the officers, after having been confined in the jail for several days, that it was proper to introduce testimony showing his failure to flee when the opportunity offered. This would be a violation of the well-known and universally established rule of the incompetency of self-serving declarations. The Wigmore doctrine has been expressly repudiated by this court in a great number of cases—larceny cases, the latest expression being *Lohrey v. Staye*, 45 South. 145.

It does not appear that the newly discovered testimony could not have been discovered by reasonable diligence before the trial; and the general rule is that a new trial will not be granted on the ground of newly discovered testimony, the only effect of which would be to impeach the credibility of the witnesses.

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Opinion of the court.

FLETCHER, J., delivered the opinion of the court.

We cannot reverse this case on account of the court's action in refusing to set aside the verdict on the ground of newly discovered evidence. Such evidence tended only to impeach the evidence of the witness McLendon, by no means the only, or indeed the strongest, witness for the state. The rule is well established that a new trial will not be granted on the ground of newly discovered evidence, the only effect of which is to impeach the credibility of a witness. *Moore v. Chicago, etc., R. R. Co.*, 59 Miss. 243.

The only other question seriously pressed is that the court erred in refusing to admit evidence to show that the defendant had an opportunity to escape from prison, and not only declined to do so, but actually warned the sheriff of the escape of a fellow prisoner. This testimony was offered after the state had proven the flight of the prisoner immediately following the homicide. It should be stated that the defendant was permitted to explain this flight fully, and that the evidence excluded related to a matter which transpired some time after the defendant had surrendered, and was entirely distinct and independent of the first occurrence. It is argued, and the argument is sustained by the great authority of Prof. Wigmore, that, since the state is permitted to prove flight as showing a "consciousness of guilt," the defendant should be permitted to prove a refusal to escape when opportunity offers as showing a "consciousness of innocence." 1 Wigmore on Evidence, 293. The learned text-writer, however, concedes that this view is opposed to the great weight of authority, and with that candor which is one of the chief qualities of his great intellect appends in the note a list of cases which utterly repudiate and reject his conclusion.

In this instance the majority of the court prefers the reasoning and conclusions of these cases, rather than the conclusion reached by the author. This is not wholly because of the number and distinction of the courts so holding, but because we think the rule rejecting such testimony is correct on principle. If a

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declaration against interest is admitted, while a self-serving declaration is rejected, why should it not be true that conduct showing guilt is admissible, while conduct alleged to show the opposite is rejected? Nothing can be better settled than that a litigant cannot manufacture testimony in his own behalf. This is but a form of this familiar principle. If the rule announced by Wigmore is correct, a prisoner who deliberately refuses to escape is but availing himself of the opportunity to manufacture testimony for himself—a thing which can never be permitted. Testimony as to a damaging admission made by a prisoner on trial is admitted manifestly because it shows a consciousness of guilt; but it will never be contended that the same prisoner can proclaim his innocence and have the benefit of such declaration on the trial as showing a "consciousness of innocence." And yet in the opinion of the majority of the court there can be no logical distinction between acts and words in this connection.

Chief Justice WHITFIELD, while differing from the majority on this point, and agreeing with Wigmore's announcement of the rule, does not regard such evidence as of high value one way or the other, and therefore concurs in the result, since, as he thinks, the guilt of the defendant is manifest and the result could not possibly have been affected by this error of the court.

Affirmed.

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NATHANIEL R. ALLEN ET AL. v. OLIVER A. LUCKETT.

[48 South. 186.]

DEEDS. *Cancellation. Reformation. Mistake. Equity jurisprudence.*

A material mistake by one or both parties to a deed as to the identity, situation, boundaries, title, amount or value of the land conveyed by it will warrant appropriate equitable relief, although its terms accord with the intent of the parties.

2. SAME. *One party relying on the representations of the other. Actual fraud not essential.*

Where the purchaser was more familiar than the seller with the boundaries of the land and the grantor, relying on the representation of the grantee, executed a deed, believing that it conveyed a small when it conveyed a large acreage, a court of equity will cancel the deed, although actual fraud was not proved.

3. APPEAL. *Code* 1906, § 4926. *Damages. Value of land.*

An unsuccessful appeal from a decree cancelling a deed to land and awarding possession, entitles the appellee, under Code 1906, § 4926, so providing, to recover damages, five per centum on the value of the land.

FROM the chancery court of Leake county.

HON. JAMES F. MCCOOL, Chancellor.

Luckett, appellee, was complainant in the court below; Allen and others, appellants, were defendants there. From a decree in complainant's favor defendants appealed to the supreme court.

Appellee was the owner of four hundred and eighty acres of timber land, in section 29, township 10, range 7 E., Leake county. The land was wild and situated in a river bottom a considerable distance and in another county from his residence. In January, 1900, he made a trade with appellants to sell them "that part of the east half and the east half of the west half of said section lying north of Pearl river" for the sum of $50. He gave appellants a deed describing the property as above, and received part payment at the time, and the balance in March, 1901, on which date another deed was executed; the first deed having

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Brief for appellants.

been lost before being put of record. In this latter deed, the land was described as "that part of the east half, and the east half of the west half, north of Pearl river, 50 acres, more or less." Afterwards, in 1905, Luckett began this suit, charging the above facts and alleging, further, that it was the intention of the grantor to convey only fifty acres of land; and that it was understood that Allen was to purchase land at the rate of $1 per acre; that complainant was not familiar with the boundaries of the property, but relied upon the representations of the purchaser that there were only about fifty acres lying north of Pearl river; that complainant, after the execution of the second deed, learned there was about two hundred acres in the tract north of Pearl river, demanded of appellants that they correct the mistake, which they refused to do, claiming that they had purchased the entire tract lying north of Pearl river, regardless of the number of acres. The bill prayed for the cancellation of the deed and for a writ of assistance to place complainant into possession of the land upon complainant's refunding the purchase price, with interest.

McMillon & Howard, for appellants.

We find very few cases where a suit like this one has been brought by a vendor against his vendee, and these are cases where the vendor was weak mentally or was a non-resident without opportunity to become acquainted with the property, and none of them, we take it are applicable to this case. We find, however, cases brought by vendees against vendors and even in them it is shown to be the duty of the vendee to examine for himself where he had as good opportunity to know the facts and had no special reason or necessity to depend on the vendor's representations, even if the vendor expressed an opinion and it proved erroneous, there is no ground for rescission. *Hall v. Thompson,* 1 Smed. & M. 443; Beach on the Modern Law of Contracts, §§ 804, 817.

There is no reason to believe from the evidence that Allen

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Brief for appellee.

knew more about the land than Luckett, who had every opportunity to know its value, number of acres, etc. He had owned it for a number of years, had hunted over it and fished in the lakes and streams running through it, and was quite an extensive dealer in lands on Pearl river; while Allen did not have any better reason or opportunity, to say the least of it, to know the land. He was not county surveyor at the time the sale was made and had never been, but was elected in 1899 and did not begin the duties of this office or run lines until afterwards.

Notice the unreasonableness of appellee's contention; he claims that he wrote the deeds intending only to convey fifty acres and that this fifty acres were to be in the extreme northern part of the section and yet he describes the land in the deed so that all the E. ½ and E. ½ of W. ½ north of the river is included, although the river might have proved to run through the extreme southern part of the subdivisions. In deeds descriptions which are most certain and material, as metes and bounds, will control that which is less so, as quantity. *Carmichael v. Foley,* 1 How. (Miss.) 591; *Potts v. Canton Warehouse Co.,* 70 Miss. 462, 12 South. 147.

The number of acres were not a condition of the trade and a sale is not voidable because of a mutual mistake as to collateral facts unknown to both parties and as to which the sources of information were open alike to both. *Sample v. Bridgforth,* 72 Miss. 293, 16 South. 876; 15 Am. & Eng. Enc. Law (1st ed.) 647, note 3.

W. A. Ellis, for appellee.

Luckett was a lawyer and Allen a surveyor at the time of the sale. Lawyers are presumed to know the law of land titles and surveyors are presumed to know courses and distances and the courses of meandering streams and the general topography of the country, to locate corners and run land lines and calculate areas and call them by their right names. These may be violent presumptions, but such is the presumption and common sense of the

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matter. Really, the means of information and knowledge in the present case, as to the acreage in question and the boundary lines are superior in Allen. He owned adjoining land and actually resided on it and at one time owned a part of the identical land in suit.

Surely there was a mutual mistake and a very great one at that. To put it as mildly as possible there was a great mistake made. Allen had no idea of getting one hundred and ninety-eight acres of land for fifty dollars, and it appears from the depositions of appellee and the charges in the bill, that he would not have under any circumstances sold this tract of land north of the Pearl river in the subdivisions named had he known that there was so much land over there. He acted upon the hypothesis that there were only fifty acres of land in this body and this information partly, was communicated to him by Allen himself. So then, something is wrong. Appellants refused to rectify, and hence the court is called on to do equity in the premises. The learned chancellor below has passed upon the facts and his finding is fully supported by the great preponderance of testimony in this case, and by right and justice and good conscience, and his decree should be affirmed because it cannot be confidently stated that it is manifestly wrong. This case is one that must stand or fall upon its peculiar facts. The appellee has met the burden and appears in this court with a decree of the chancellor certifying to that fact and it is the invariable rule of this court to affirm in such a case. The words "more or less" have been judicially construed in many cases. We cite the court to the following: 15 Am. & Eng. Ency. of Law (1st ed.) 717, 718, 719, as illustrating the case in some of its forms. See the following cases in Mississippi: *Phipps v. Carpenter* 24 Miss. 697; *Miles v. Miles,* 84 Miss. 624, 37 South. 112; *Kerr v. Kuykendall,* 44 Miss 137

May, Flowers & Whitfield, on the same side.

Both parties were innocently mistaken. If it is worth the in-

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quiry to find out which of the parties was in better position to know the real facts, it will be found that Allen had the advantage. He lived near this land and owned a part of section 20 whose southern boundary line is the northern boundary line of section 29. One of the lines, therefore, about which the parties seemed to have been so badly mistaken is the boundary of part of Allen's land. Besides Allen had been or perhaps was at the time, acting as surveyor of the county. He had expert knowledge of such things and his familiarity with them would naturally cause him to inquire about that and especially to have some idea as to the location of his own boundaries. Luckett says that Allen pointed out to him a line stating that it was the northern boundary line of the section and that this line was not very far from the river. The chancellor found for the complainant on the facts. He cancelled the deed made to Allen on the 12th of March, 1901, and that made on the 29th day of January, 1900. He could not have done otherwise if he granted any relief at all to complainant. He certainly could not require the complainant to deed to the defendants some particular fifty acres north of the river, nor could he justly require the complainant to deed the entire two hundred acres at one dollar per acre. The mistake was so material as to make it necessary to set aside the pretended contract, for there was in fact no contract. The minds of the parties never did meet upon the subject matter of the contract, its location or amount.

We think there is no necessity for the citation of authorities to show that equity will relieve in cases of this kind whether the situation was created by fraud or mistake. As we have said, we are willing here to rest the case upon the theory that this situation was created by the mutual mistake of the parties. We call the court's attention, however, to the well considered case of *Bigham v. Madison* (Tenn.), 47 L. R. A. 267.

Argued orally by *J. N. Flowers,* for appellee.

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Opinion of the court.

FLETCHER, J., delivered the opinion of the court.

On this record the chancellor must have concluded that Allen was more familiar with the boundaries of the land than was Luckett, that Allen pointed out these boundaries, that the sale was made upon the faith of these representations, that the sale was by the acre, and that apppellee did not intend to convey more than fifty acres; whereas, in truth, nearly two hundred acres were conveyed. We are not warranted in overthrowing this finding of fact.

Upon this state of facts the jurisdiction of a court of equity to decree rescission of the contract and cancellation of the conveyance is well established. It is immaterial whether actual fraud be imputed to appellant. The result is the same, if the transaction was the result of a mutual mistake. If the terms are stated according to the intent of the parties, but there is an error of one or both in respect of the thing to which these terms apply—its identity, situation, boundaries, title, amount, value, and the like—then it is elementary that a court of equity may grant appropriate relief, provided the fact about which the mistake occurs was a material element in the transaction. 2 Pomeroy's Equity Jurisprudence §§ 852, 253; *Bigham v. Madison.* 103 Tenn. 358, 52 S. W. 1074, 47 L. R. A. 267.

The court having required appellee to refund the purchase money, with interest, the case must be, and is hereby, *affirmed.*

After the delivery of the foregoing opinion the clerk entered a judgment affirming the decree appealed from without awarding the five *per centum* damages provided for in Code 1906, § 4926.

Thereupon appellee moved for an amendment of the judgment so as to allow him five *per centum* on the value of the land, which motion was sustained, the opinion being in these words:

Per Curiam. Motion to allow five per cent. damages sustained.

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Statement of the case.

MILLS-GUY COMPANY v. WILLIAM H. DICKERSON.

[48 South. 404.]

DEEDS. *Construction. Husband and wife. Property conveyed.*

A deed, naming a wife only as grantor and purporting to convey her crops to be grown, does not convey cotton grown by her husband in which she had no interest, although he signed the deed and some of his personal property was conveyed thereby.

FROM the circuit court of Pike county.

HON. MOYSE H. WILKINSON, Judge.

Dickerson, appellee, was plaintiff in the court below; the Mill-Guy Company, appellant, was defendant there. From a judgment in plaintiff's favor, predicated of a peremptory instruction, defendant appealed to the supreme court.

On February 19, 1906, Laura Booth and Barney Booth, her husband, executed their joint note to the Auburn Mercantile Company for $72.34, and on the same day there was executed and delivered to Dickerson, appellee, as trustee for the Auburn Mercantile Company, a chattel mortgage or deed of trust, which recited "that, whereas, Laura Booth, party of the first part, is indebted to the Auburn Mercantile Company," etc. This instrument further recited that said company expected to advance her supplies, merchandise, etc., not to exceed the amount of $72.34, and it conveyed "her entire interest in any and all crops of cotton and other agricultural products to be raised by her and any hand she may employ during the year 1906 on land belonging to one Bowman, or any other land she may cultivate in said year," and also certain personal property, etc. This deed of trust was signed by Laura Booth and Barney Booth, and duly acknowledged and filed for record March 9, 1906. It appeared that Barney Booth, being indebted to the appellant, Mills-Guy Company, in a large amount, had, on January 13,

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Brief for appellant.

1906, executed a trust deed in its favor covering all crops, etc., that might be raised by him during the year 1906. This deed of trust was duly acknowledged and filed for record April 17, 1906. During the year 1906 Barney Booth raised a crop of cotton on lands rented by him from Bowman and other parties, and during the autumn of that year he delivered two bales of cotton, of the value of $80, to the appellant, raised by him, which was credited on his account. Appellant had no actual knowledge of the lien claimed by the Auburn Mercantile Company, and no notice thereof whatever, unless the recorded deed of trust above mentioned gave it constructive notice. It was not shown that Laura Booth raised any cotton on any lands during that year, or that she rented any lands of Bowman.

The suit originated in the court of a justice of the peace and was appealed to the circuit court by defendant, where a trial *de novo* was held.

George Butler and *Mixon & Cassidy,* for appellant.

It will be seen that the plaintiff wholly failed to make out his case. There is not one scintilla of evidence in the record showing, or tending to show that Laura Booth raised any cotton during the year 1906 on the lands rented of Bowman or elsewhere. The fact is, the plaintiff plainted his case in the court below upon the fallacious assumption that the deed of trust to Dickerson, trustee, was effective to convey as against the whole world any and all crops raised by Barney Booth during said year. It will be carefully noted in this case that Barney Booth undertook to convey nothing. The deed begins with the recital that "Laura Booth, party of the first part," is indebted, etc. The party of the first part, Laura Booth, bargains, sells and conveys. The whole deed purports to be her act alone. Barney Booth is not mentioned in the face of the deed. The whole of the deed is in the singular. By what words did Barney Booth convey his title to the property described in the deed? That learned and discriminating annotator of the Trinity Set,

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Brief for appellee.

Mr. Freeman, says: "We think it safe to assert that the weight of the adjudicated cases if not the better reasoning, is in support of the rule that the person in whom the title to land is vested must use appropriate words as a grantor to convey the estate; that signing, sealing, and acknowledging a deed by one party in interest in which another than such party purports to be the only grantor will not convey the former's estate." See note to *Payne v. Parker,* 25 Am. Dec. 226, and notes to *King v. Rhew,* 23 Am. St. Rep. 82, for a full discussion of this subject.

Barney Booth conveyed absolutely nothing by affixing his signature to his wife's deed of trust. We are not unmindful of the cases of *Armstrong v. Stovall,* 26 Miss. 275, and *Stone v. Montgomery,* 35 Miss. 83.

If an explanation of why Barney Booth signed the deed is asked, I answer by saying that the buggy was his property and may be accounted for in that way. But by this deed he certainly did not intend to, nor did he convey any cotton to be raised by him.

But if mistaken in the premises, and as between him and the other party to the deed of trust he by his act encumbered his cotton crop, still the third party without actual notice of the condition of affairs is not affected by this deed. If he encumbered cotton, what cotton was it? Manifestly cotton raised by his wife on land rented by her of Bowman and not cotton raised by him on Bowman's land.

Clem V. Ratcliff, for appellee.

It is sought to reverse the judgment in this case because appellant claims that the deed of which appellee predicates their claim did not cover the cotton recovered in the suit. It is plain to be seen that Barney Booth and his wife, Laura Booth, intended to encumber and that they did encumber the crops grown on the land of W. L. Bowman for the year 1906. The deed of trust to the appellee recites that it covers and includes crops raised on the land of Bowman specifically, and identifies no

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Brief for appellee.

other land. This deed of trust is signed and executed by both the husband and the wife, for necessary supplies for themselves and family. It is admitted in briefs of counsel for appellant that the owner of personal property embraced in the deed of trust to appellee, the buggy, was the property of Barney Booth, the husband, and that he intended to convey it and did convey it to the trustee and that the deed of trust is valid and binding against the husband, Barney Booth, as to that extent. Now, there is nothing in the terms of the contract in the deed of trust to indicate that he, Barney Booth, so intended to convey that part, or any particular part of the property embraced in the deed of trust. There is no more in the contract itself to indicate that he intended to convey the buggy, than there is in the contract itself to indicate that he also intended to convey the crops, cotton, etc. There is nothing contained therein to make a divisible contract, and in the absence of this provision, if he intended to convey a single item contained in the contract, he must be held to have intended to convey and to have conveyed everything the contract called for, including, of course, the cotton. It is admitted that this deed of trust to appellee was and is first of record. Then he would be entitled to recover the cotton as after acquired personal property. See *Bacot v. Varnado,* 91 Miss. 825, 47 South. 113. The deed of trust being first of record, signed by both the husband Barney Booth, and the wife Laura Booth, certainly was sufficient to give notice to appellant, that they might investigate just to what extent the husband Barney did really intend to be bound by executing the deed of trust.

The mere fact that the personal pronoun used in the instrument is her instead of his or their, as the case may be, does not change the intent and purpose of the instrument, nor does it affect the validity of the instrument. The blanks for pronouns in the original deed of trust might have all been left blank and nothing inserted therein at all, and yet if it were signed by two people, especially husband and wife, the instrument must be construed to be the obligation and contract of both. The names of

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sureties are frequently omitted from the body of the bond, yet the obligation is valid and binding. It will be further noted that the husband, Barney Booth himself, is not making any sort of contention that he did not intend to make, and that he did not make in good faith the deed of trust under which the appellee claims. Why did counsel not ask him if he intended to enter into that obligation jointly with his wife. Certainly if he, himself, stands by the contract in the deed of trust, and does not repudiate it, nor undertake to explain it away, nor to void its legal efficacy, then the appellant cannot repudiate it for him. He has never intimated that he wished to claim any of the defenses interposed by the counsel for the appellant.

Argued orally by *George Butler,* for appellant.

FLETCHER, J., delivered the opinion of the court.

The sole question presented for decision is whether the trust deed given on February 19, 1906, to the Auburn Mercantile Company, which purported to convey all crops raised by Laura Booth on a certain plantation, operated to convey the crops raised by her husband, Barney Booth, on the same plantation, or, if not, whether the fact that Barney Booth, as well as Laura Booth, signed and acknowledged the trust deed, was sufficient to put subsequent purchasers and encumbrancers upon inquiry. Appellant is such a subsequent encumbrancer and purchaser. The trust deed in question names only Laura Booth as the grantor, recites that it is to secure a pre-existing debt due by her and supplies to be advanced to her, and conveys her entire interest in the crops to be grown on the Bowman land. Nowhere in the body of the trust deed is there any reference to Barney Booth's crops, or any intimation that he meant to convey any crops to be grown by him. True, he signed the trust deed, but there is nothing in the instrument to show that he is the husband of the grantor; but, if there were, his signing of the deed is explained by the admitted fact that certain of his individual property is

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also conveyed. There is no dispute as to the fact that the cotton sold appellant was grown by Barney Booth on land which he had rented and that Laura Booth had no interest therein. We do not think that *Stone v. Montgomery,* 35 Miss. 83, and *Armstrong v. Stovall,* 26 Miss. 275, have the slightest application. These cases are discussed, and their true meaning settled, in *Marx v. Jordan,* 84 Miss. 334, 36 South. 386, 105 Am. St. Rep. 457. Besides, we are now dealing with the question as to whether Barney Booth actually executed the deed of trust, or whether he assented to his wife's execution. It is a question of what property was conveyed, and we feel sure that the trust deed upon which appellee relies cannot be held to convey property not mentioned therein. If the husband's crop was not in fact conveyed, it cannot be argued that his signature to the instrument can operate to put a purchaser upon inquiry as to a fact which in truth never existed. In no aspect of the cause was the peremptory instruction for the appellee proper.

Reversed and remanded.

ALFRED F. OLIVER v. ESTHER D. SMITH ET AL.

[49 South. 1.]

1. ESTATES OF DECEDENTS. *Executors and administrators. Final accounts. Unpaid creditor. Effect of order for distribution. Administrator himself a creditor.*

The presentation of an account, in form a final one, by an administrator and a decree of the court approving the same and ordering a distribution of the assets to the heirs of the decedent does not affect the rights of an unpaid creditor whose debt had been probated; as to such debt the estate remains unadministered, although the creditor was himself the administrator.

2. SAME. *Limitations of actions. Probated claim due administrator.*

The statute of limitations do not run against a probated debt due to the administrator from the estate of his intestate.

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Brief for appellant.

FROM the chancery court of, second district, Panola county.
HON. ISAAC T. BLOUNT, Chancellor.

Oliver, appellant, was complainant in the court below; Mrs. Smith and others, appellees, were defendants there. From a decree adverse to complainant, dismissing the bill, he appealed to the supreme court.

The opinion of the court sufficiently states the facts. The appellees, defendants below, were distributees, of the estate of J. B. Wynne, deceased, of which the appellant had been appointed and served as administrator.

L. E. Rainwater, for appellant.

The law appropriates the estate of a deceased debtor to the payment of expense of administration and to settlement of probated debts, before any distribution of the estate can be made among the heirs; and the administrator of the estate cannot be discharged so long as there are funds of the estate in his hands, and valid and subsisting claims unpaid. *Pollock v. Buie,* 43 Miss. 140; *Barr v. Sullivan,* 75 Miss. 536, 25 South. 772.

The administrator takes the estate of his intestate in trust primarily for the benefit of creditors of the estate; and no estate can be said to be fully administered while there yet remain debts of the estate for the payment and satisfaction of which the estate is liable. In *Pollock v. Buie, supra,* our court said, "the decree for distribution upon the final settlement in this case was evidently founded on the presumption that all existing debts against the estate had been fully satisfied." The rights of the distributees of the estate as regards its distribution are merely contingent until the probated debts have been paid. Distribution of the estate cannot be made among the heirs by the legal representative of the decedent until the valid probated debts have been settled.

It is true that the administrator stated in his petition accompanying his final account that he had fully administered the estate; but the petition does not recite that the debts have been paid, nor does the decree on the final account so state.

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Brief for appellees.

Oliver, as an individual creditor of the estate of J. B. Wynne, deceased, stands in the same relation to the administrator of the estate as any other creditor would stand, with the exception that, as he is also administrator, he, as creditor, could not sue himself as administrator; and his only remedy as a creditor lies in a court of equity. As a creditor Oliver could not appeal from the decree on final account because he, as a creditor, was not a party thereto. 17 Am. & Eng. Ency. Law (1st ed.) 497, 499, note 1.

Was Oliver as creditor, barred by the four-year statute of limitation? The answer is in the negative for two reasons: 1st, it is alleged in the bill, and not denied in the answer that his claim against the estate was not due and payable until several months after the death of Wynne, the intestate; 2nd, a debt due by the estate of a decedent to the individual who qualifies and acts as administrator of the estate will not be affected by any statute of limitation during the time in which the individual is performng such trust. Since the individual cannot sue himself as administrator, the statute of limitation will not run against him. *Buckingham v. Walker,* 48 Miss. 609; *Sims v. Sims,* 30 Miss. 333.

P. H. Lowrey, for appellees.

The account of the appellees allege that with his final account the administrator had filed a petition for discharge in which he had specifically stated that the estate was fully administered. His petition accordingly meant that all debts which were legally due by the estate had been paid. The answer further sets up the indisputable fact that the administrator, by his own showing, has held the funds of the estate without returning inventory or having appraisement made, and without rendering any account, for eight years; and that he now comes into court of equity to demand that his probated claim against the estate be paid in full insofar as the funds in his hands as administrator will suffice. To allow his claim would be in gross violation of the well-established maxim that "no man

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can take advantage of his own wrong." To allow an administrator to neglect every duty incumbent upon him, and to allow him practically to appropriate the whole estate to his own interests because he has so long neglected his duty, is unthinkable.

Under the circumstances the appellant's claim is barred by the long lapse of time. The bill recites that a list of the probated claims is filed as an exhibit thereto, and this list shows that all the claims were probated as early as December, 1898, over eight years prior to the filing of this bill. Code 1906, § 3105, provides that "action may not be brought against the administrator upon any judgment or other cause of action against the intestate, but within four years after the qualification of such executor or administrator." While this court has held in *Sims v. Sims,* 30 Miss. 333, that an administrator may retain sufficient funds of the estate for his own probated claim and take credit therefor in his final settlement after the expiration of four years, yet, this does not mean that he may after the expiration of four years bring a suit to enforce this claim. See *Trimble v. Farriss,* 78 Ala. 260.

FLETCHER, J., delivered the opinion of the court.

This suit was instituted by appellant in his capacity as creditor in order to collect a probated debt. It was shown that this creditor was the administrator and had filed his final account. Upon the hearing of this final account, the existence of unpaid probated claims seems to have been overlooked, and distribution was directed to be made among the heirs without first paying the debts of the estate. Creditors were not parties to this proceeding, and, of course, their right to payment cannot be affected by the decree directing distribution. As to such creditors the estate remains unadministered. *Pollock v. Buie,* 43 Miss. 140.

We do not think this rule is here inapplicable because the creditor is himself the administrator. Certainly the final account and the petition for its allowance were filed by appellant

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Statement of the case.

in his representative capacity, and a decree directing distribution, in which the debts were inadvertently overlooked, cannot be held to be final and conclusive as to appellant in his capacity as creditor, especially where it is shown that there had been no adjudication by the court as to outstanding debts. In such a case his rights are the same as those of any other creditor.

That the statute of limitations does not bar the claim of the administrator against the estate for an individual debt duly probated and not barred at the time of his appointment is well settled. *Sims v. Sims,* 30 Miss. 333.

The action of the chancery court in *dismissing* the bill was error. *Reversed and remanded.*

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY v. GEORGE C. PAINE.

[48 South. 229.]

PUNITIVE DAMAGES. *Telephone company. Denying service*

Where a telephone company, in an effort to obey the order of a supervising state commission, abolishing free county telephone service and fixing charges, forwarded a general circular to the managers of its exchanges in the state directing a compliance with the order, and the manager of an exchange, not knowing that the franchise of the company in his city required it to extend such services free to its patrons there, courteously denied plaintiff free county service, until his attention was called to the franchise when he at once communicated with his company and promptly resumed the free service, the company is not liable to plaintiff for punitive damages because of such denial.

FROM the circuit court of Monroe county.

HON. EUGENE O. SYKES, Judge.

Paine, appellee, was plaintiff in the court below; the telephone company, appellant, was defendant there. From a judgment in plaintiff's favor, for $200, defendant appealed to the supreme court.

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Statement of the case.

Plaintiff based his claim for damages on the terms of a franchise granted by the city of Aberdeen to the telephone company, as set forth in an ordinance of that city, and which provided that "there shall be a free intercommunication between Aberdeen and other subscribers in Monroe county." Aberdeen and Amory were both in Monroe county, and plaintiff was a subscriber of the telephone company, and the party whom he called at Amory was also a subscriber. Plaintiff put in his call, and was told by the person at the exchange receiving his call that he would have to pay ten cents. He replied that he was entitled to free county service by the terms of the franchise granted the telephone company, and was advised that the persons in charge of the local exchange had instructions from the home office to discontinue the free county service and therefore refused plaintiff the connection demanded by him.

No actual damages were claimed to have been sustained, and the telephone company insisted that the charge in this instance resulted from an oversight, and set up that the Mississippi Railroad Commission had made an order abolishing what was known as free county service throughout the state of Mississippi, theretofore established by order of the commission, and fixing the charges which the telephone company should exact for service between exchanges in the same county, and that after this order of the Railroad Commission was made the company sent instructions to all its exchanges to discontinue free county service in accordance with the order of the Commission. The manager of the exchange at Aberdeen received a copy of these instructions, and as soon as he found out that they were in conflict with the franchise granted by the city of Aberdeen he wrote to the manager about it and received instructions to put back into effect the old free county service. However in the meantime plaintiff has been refused the free county service demanded by him.

It was shown that plaintiff was courteously and politely treated when free service was refused him.

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Brief for appellee.

Harris & Willing, for appellant.

In no aspect of this case can the judgment for two hundred dollars against the telephone company be sustained. In the first place, the plaintiff bases his claim upon a breach of the contract which the telephone company had with the city of Aberdeen. Conceding that he had a right to sue under that contract upon the idea that it was made for his benefit, or for the benefit of the subscribers of the exchange in the town of Aberdeen, he cannot recover punitive damages, because punitive damages are never awarded for breach of contract. This is elementary law. But, aside from this, the circumstances of the case as shown by the record would not warrant the awarding of punitive damages even if it should be treated as an action of tort. It is clearly shown that there was simply a mistake made in this particular case, which was promptly corrected as soon as it was found that the mistake had been made. The manager and the operator at Aberdeen were acting under the general instruction which had been sent out (mailed out, doubtless, by some clerk at Nashville), to all exchanges, and they, manifestly, thought they were doing what they had a right to do when they refused him service. *Railroad Co v. Marlett,* 78 Miss. 872, 29 South. 62.

McFarland & McFarland, for appellee.

The case is the result of the appellant company giving instructions to its Aberdeen office, in utter disregard of the agreement with the city of Aberdeen, to furnish free connection to its subscribers in Monroe county.

The jury passed upon the question of whether or not there was such a disregard of the rights of the telephone subscribers in Aberdeen and the appellee in particular, as to make appellant liable for punitive damages, and we do not see how under the facts in this case the verdict can be set aside.

If this case is reversed it will let down the bars to any corporation which desires to flagrantly override the rights of the

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citizens of the county or state, and persisting to do so until some one brings suit, and then the corporation will claim that it was the mistake of the "little operator" and thus escape all liability.

What is to prevent appellant from again sending instructions to its Aberdeen office to charge toll to its city subscribers for county connection, and collecting tolls until sued, and then claiming it made a mistake.

The appellant company knew of the contract with the city of Aberdeen in reference to free county service but disregarded it entirely. The best way to keep this fact fresh in its manager's mind is to affirm this judgment of $200.

George C. Paine, on the same side.

It is apparent that the only question in the case is: "Ought the jury to have given a verdict for punitive damages?

If there ever can be a wilful wrong, evincing a disregard of the rights of others, the attempted order of the appellant to charge the subscribers of Aberdeen for phone connection with its other county subscribers, constituted it.

The testimony shows that appellee was a regular subscriber to the appellant and was justly entitled to its service; that the Bank of Amory was in Monroe county, and was a regular subscriber to appellant and as such was entitled to its service.

The appellee requested the free service and was refused; then he protested and called appellant's attention to the fact that it was under contract to give free service, and even a request to confer with its manager as to why a refusal was given was denied. For a truth such conduct constituted a wilful wrong, and evinced a disregard of appellee's rights.

FLETCHER, J., delivered the opinion of the court.

The sole question presented for decision in this case was the action of the trial court in submitting to the jury the question of punitive damages. While it may be true that the appellant

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company, under its contract with the city of Aberdeen, was under the legal duty of furnishing to all its local subscribers free connection with all its other telephones in Monroe county, yet there is totally wanting in this case any element of wilful, malicious, fraudulent, or oppressive wrongdoing. The general officers of the company did no more than to promulgate, in a general circular addressed to all its Mississippi managers, the then recently adopted order of the Mississippi Railroad Commission authorizing the abolition of free county service, with a direction to all employees that they should be governed by these new rules. The local manager simply followed instructions, in ignorance of the conflict between these rules and the contract which the company had with the city of Aberdeen. As soon as this conflict was called to his attention, he took the matter up with the home office, and the free county service was promptly re-established in Aberdeen. There is no pretense that the operator was otherwise than polite and courteous to Mr. Paine, and we cannot see any ground for the imposition of punitive damages.

It was error to permit the jury to inflict such damages, and for that reason the case is *reversed and remanded.*

GEORGE W. FAIRFIELD v. LOUISVILLE & NASHVILLE RAILROAD COMPANY.

[48 South. 513.]

1. RAILROADS. *Failure to receive passenger. Pleadings. Issue. Instructions.*

In a suit against a railroad company for refusing to receive a passenger, the only defense pleaded or otherwise made being that the train was already full when plaintiff demanded carriage, it is error to instruct the jury that plaintiff cannot recover because of defects in her ticket or evidence of right to transportation.

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Brief for appellant.

2. SAME. *Passengers. Coupon ticket. "Void if detached" provision on.*

A condition on a railroad coupon ticket, that the coupons are "void if detached" must be reasonably construed to prevent injustice, and the holder cannot be denied passage merely because the coupon has been inadvertently detached, if both parts are presented and it can be seen by inspection that they correspond.

3. HARMLESS ERROR. *Appeal. Instruction.*

Erroneous instructions on the measure of damages are harmless where the jury find that there is no liability.

FROM the circuit court of Harrison county.

HON. WILLIAM H. HARDY, Judge.

Mrs. Fairfield, appellant, was plaintiff in the court below; the railroad company, appellee, was defendant there. From a judgment in defendant's favor plaintiff appealed to the supreme court.

The suit was for damages alleged to have been caused by the action of defendant's servant, a gateman, in New Orleans, in denying plaintiff admission to defendant's train which she desired to take for her home, at Pass Christian, Mississippi. The other facts are sufficiently stated in the opinion of the court.

Rucks Yerger and *Barrett & Taylor,* for appellant.

The uncontradicted evidence shows that there was abundant seat space in the train when plaintiff first presented the ticket and at no time was she refused admission for the reason that there was not sufficient seating capacity to accommodate her. The gateman was evidently in error, probably he made a mistake at first; and, as some small men, clothed with temporary authority, sometimes are, probably became obstinate and would not admit his mistake. In any event, it was clearly his duty to have explained to appellant that she was at the wrong gate, if such was the case, which the evidence does not show, and he did not perform his duty.

Instructions 15 and 16 for the defendant are erroneous, misleading the jury, for while the ticket book when presented to the jury may have been fastened together by a metal clamp,

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Brief for appellee.

still the tickets fastened to the book showed the same number and even though they might have been detached from the original fastening, when the ticket and the cover were presented at the same time plaintiff was entitled to passage thereon. See *Wightman v. C. & N. W. R. R. Co.*, 2 L. R. A. 185, and foot notes, 9 Am. Rep. 778, also *Pa. R'y Co. v. Bray*, 25 N. E. 441.

The rule of the company to refuse tickets if detached is only valid because of its reasonableness, and if the book, the original cover, and the ticket itself or coupon are presented together, showing that they belonged together and are parts of the whole and would together make a whole, then the reason for the rule fails, and to extend it to deny the holder passage under such circumstances would be a gross hardship, an arbitrary act on the part of the railroad company without reason, and such an expansion of the rule would avoid the very rule itself for unreasonableness.

Gregory L. Smith and *Harry T. Smith*, for appellee.

It is clear, we think, that the burden was upon the plaintiff to prove the allegations of the complaint, certainly where those allegations are material to the right claimed. The plaintiff, in this case, alleged that she presented a valid ticket; the burden rested upon her to prove this allegation, and she offered no evidence, except the presentation of the book in question. This book contained a contract that the coupons should be void, if detached. The coupons were detached at the time the book was offered in evidence, and there was no evidence tending to show when they were so detached, or how. We think that a peremptory charge might have been given for the defendant for this reason, and certainly the plaintiff cannot complain that the question was left to the jury to determine whether or not the coupons were attached at the time they were presented to the gate-keeper. Even if plaintiff had testified expressly that the tickets were attached, it would not have been error to charge the jury that the burden rested upon her to establish the fact.

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Opinion of the court.

That the regulations requiring the presentation of the book with the tickets attached is reasonable, and, therefore, valid, seems to us to be plain. These tickets are issued at a reduced rate, in consideration of the fact that they are not transferable. If they could be presented when detached, it would be impossible to prevent transfer, and, in addition to this, it would be impossible to limit their number. Railroad tickets are identified by the signature of railroad officers, and special contract tickets, such as this, are further identified by the signature of the purchaser. These signatures appear upon the book, and not upon the coupons themselves, so that after a coupon is detached, there is no way of identifying the ticket,—that is, of telling whether it was a ticket printed by the company or printed by an imposter. It is said that the tickets were numbered, and this is quite true, but any person can have tickets numbered as well as printed. Not only could these tickets be printed, but the same old ticket could be re-sold by the conductor who had taken it up at a reduced rate, either to another passenger, or to another conductor, and thereby defraud the company. Indeed, to hold that such tickets, after they had been detached, must nevertheless be accepted, notwithstanding the printed condition in the contract to the contrary, would be to impose upon the company such frauds as to render it impossible to continue the issuance of such tickets without material loss.

FLETCHER, J., delivered the opinion of the court.

The testimony of plaintiff and her husband, if believed by the jury, tended to show such treatment by the servants of the railroad company as would warrant recovery. To meet this proof, the company offered nothing of an affirmative or positive character. None of the witnesses for the railroad remembered anything of the circumstances of the occurrence. In this state of the proof, the verdict of the jury is little short of remarkable. But the cause of this verdict can be understood when the instructions asked and secured by the railroad company are attentively

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examined. Mr. Fairfield testified that he bought at Pass Christian a coupon book containing ten tickets to New Orleans, good on any train operated over defendant's line. He and his wife used two of the tickets in going to New Orleans, and when ready to return presented the book, with only two tickets missing, to the gatekeeper, and were refused admission. This book containing the tickets was examined by the ticket agent at New Orleans and pronounced good for the train upon which plaintiff sought to take passage. The tickets contained the usual stipulation that they were void if detached from the book; but there is no hint in the pleadings that the company would rely as a defense upon the point that the tickets were so detached. Indeed, the defendant company pleaded that the seats were all sold and occupied at the time plaintiff applied for admission at the gate, and therefore admission was properly refused. There was no suggestion in the proof that the tickets were not fastened to the book when presented, and no complaint by either the gatekeeper or the agent on this ground; and yet in this state of the record the jury was charged in instructions Nos. 15 and 16 that the plaintiff could not recover unless she had shown by the evidence that the book contained coupons which had not been detached, and, again, that she could not recover unless she showed that at the time she demanded entrance she presented to the gatekeeper the book which at the time contained coupons which had not been detached from the fastening by which they were held in the book at the time that it was sold to her husband.

These instructions, even if abstractly and in a proper case correct, have no place in the case made by this record. Their only effect was, after the case had closed, to inject a false issue before the jury, not suggested by the pleadings or the proof. Indeed these instructions are equivalent to a peremptory charge, since the plaintiff, misled by the pleadings, had offered no proof upon an issue which nobody suspected would be important. Then, too, the instructions are not correct, considered as an abstract proposition of law. It is not true that the

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holder of such ticket is to be denied passage merely because the ticket had inadvertently been detached, if both book and ticket are presented, and it can be seen by inspection that they correspond. The condition, "Void if detached," etc., must be sensibly and reasonably construed, to the end that no injustice may be done to either party to the contract. What we consider the only just and tenable view on this question is thus expressed by the Wisconsin court: "The words, 'Not good for passage if detached,' would seem to have been so placed upon the ticket to prevent imposition by the separation of the parts and the use of each as a single-trip ticket; but where such parts of the tickets become separated by such inadvertence, and are then in good faith both presented together and at the same time to the same conductor on the going trip, the purpose of such words would seem to be as fully attained as though the two parts of the ticket had not been previously separated. In other words, the presentation to the conductor of the two parts of the ticket, under the circumstances found, is the same, in legal effect, as though such parts had not been detached when so presented. It is to be remembered that the ticket was the mere evidence of the contract of carriage, and that such evidence consisted of two parts designed for separation. To imply such forfeiture of the contract from such mere inadvertent separation, under the circumstances found, when no word, letter, or figure on either part of the ticket was thereby obliterated, and when no perceivable injury to the defendant could result therefrom, would be to destroy a statutory right upon the merest technicality, and in the absence of a clearly expressed stipulation to that effect. Even a strict literalism is not to be so rigidly enforced as to defeat the manifest purpose of a contract under a statute. Whether a different rule should prevail where the passenger wilfully, and against the protest of the conductor, separates the coupons or parts of a ticket, as in some of the cases cited, need not be here considered." *Wightman v. Chicago & Northwestern R. Co.*, 73 Wis. 169, 40 N. W. 689, 2 L. R. A. 185, 9 Am. St. Rep. 778.

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Statement of the case.

We will add that in our judgment instructions Nos. "O" and 11 ought not to have been given; but, since they relate alone to the measure of damages, we would not reverse on this account, since the jury has found that no liability at all existed. They should not, however, be given on another trial.

Reversed and remanded.

ELMIRA LACKEY ET AL. v. ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY.

[48 South. 238.]

RAILROADS. *Road bed. Maintenance. Overflow of land. Adjustment of past damages. Altered construction. Release of future damages.*

Where in the adjustment of a claim for past damages caused by overflows of land, a railroad company makes alterations in its road bed, and, in consideration thereof, the owner released it from future damages caused by the operation of the road as altered, and the alteration consisted partly in the cutting of a ditch on its right of way and the company kept the ditch opened for several years after the adjustment, the release does not operate to relieve the railroad company from damages resulting from a subsequent failure to keep the ditch opened.

FROM the circuit court of Lee county.

HON. EUGENE O. SYKES, Judge.

Miss Lackey and others, appellants, were plaintiffs in the court below; the railroad company, appellee, was defendant there. From a judgment in defendant's favor the plaintiffs appealed to the supreme court.

The plaintiffs were the heirs of W. L. Lackey, deceased, and the defendant the successor of the Kansas City, Memphis & Birmingham Railroad Company. See report of suit between plaintiffs' ancestor and the predecessor of the defendant, growing out of the original construction of the railroad track and consequent overflowing of land, in the settlement of which the release involved in this case was executed, *Kansas City, etc., R.*

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Statement of the case.

Co. v. Lackey, 72 Miss. 881, 16 South. 909, 48 Am. St. Rep. 589.

The declaration charged that, when the defendant railroad company's predecessor built its line or railroad across the land described in the declaration, it was negligently and unskillfully constructed, so as to cause the lands and crops of the plaintiffs' ancestor to be overflowed by the waters of Town creek; that plaintiffs' ancestor, W. L. Lackey, brought suit against said defendant's predecessor and recovered a judgment on that account, and that same had been paid off and discharged; that thereafter plaintiff's ancestor and the defendant's predecessor railroad company entered into an agreement by which all past damages were settled for a cash consideration and certain alterations of the roadbed of said defendant were made, and in consideration of the alterations, said defendant's predecessor and its successors were thereby to be absolved from any liability for future damages on account of the overflow of said land, so long as they operated and maintained its railroad as then constructed; that on account of the failure of defendant to operate and maintain its railroad as constructed at the time of the execution of the release plaintiffs have been damaged, etc.

The defendant railroad company pleaded the release as absolving it from any further liability to Lackey, his heirs, assigns, executors, administrators.

The release contained the following provision: "And for the further consideration of the work done by said company at my request, as hereinbefore set forth, which work consists of the following: The closing up of trestle No. 216 on said land, and the cutting into a continuous ditch of the barrow pits on each side of the track, over and along said land, which work has been completed in each detail to my satisfaction, and in the manner prescribed and directed by me—for said consideration, and each of them, I do hereby release said Kansas City, Memphis & Birmingham Railroad Company, its successors and assigns, its officers and agents and employees, from all actions,

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Brief for appellants.

causes of action, suits, and damages of every nature whatsoever that have accrued to me on the said northeast quarter of section 6, township 9, range 5 east, in said Lee county, Mississippi, up to the date of this instrument, and for all that may hereafter accrue to me on said land, on account of damage to the same, all that the same may sustain in any way by reason and during the continuance of the maintenance and operation of said railroad thereover as the same is now constructed. This release and the covenants herein shall be binding, not only upon me, but my heirs, executors, administrators, and assigns, and shall run with and be binding upon the land herein described."

Plaintiffs' replication was predicated of the idea that the release absolved the railroad company from damages only so long as said company continued to operate and maintain its railroad bed as constructed at the time said release was executed, and that the work agreed to be done as part of the consideration for said release included the keeping open of the ditches on each side of the track, and that it was the duty of said railroad company to keep said ditches open to carry off water.

The defendant's demurrer to the replication was sustained, and, leave to plead further not being asked, judgment final was rendered for defendant.

Anderson & Long, for appellants.

The appellee contends that immediately upon the execution of the release of W. L. Lackey, as set up in the pleading, that it was absolved from any further liability to Lackey, his heirs, executors and administrators. Appellants contend that the release is only from all past damage and from future damage so long as the railroad company continued to operate and maintain its railroad as it was then constructed at the time of the release, and that the work named in the release, as having been done, the filling up of trestle No. 216, was a part of the consideration for the release, and that it was the duty of the appellee to keep

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Brief for appellee.

it filled up; if it washed out, it must be filled up again by the appellee, and that the cutting into a continuous ditch of the borrow pits on each side of its track, was a part of the consideration for the release, and that it was the duty of the appellee to keep the ditch cleared out from time to time as might be necessary in order to keep it in practically the same condition as they were at the time of the giving of the release. If the contract does not mean this, then that part of the release which reads:

"And for all damages that may hereafter accrue to me, or to said land on account of damages to the same, or that the same may sustain in any way by reason and during the continuance of the maintenance and operation of said railroad thereover, as the same is now constructed;" means absolutely nothing whatever, and is mere surplusage in the release.

It is almost too familiar a principle of construction of contracts, that the instrument must be construed as a whole and every part thereof, and every word therein, given its proper meaning if possible, to require a citation of authorities. However, we cite 17 Am. & Eng. Ency. Law (2d ed.) 7, and the authorities there cited; *Atkinson v. Sinnott,* 67 Miss. 502, 7 South. 289.

It is equally as well settled by law, that where a contract is ambiguous or of doubtful construction, that the court will take into consideration, the situation of the parties at the time of its making and the objects sought to be accomplished by them. *Tufts v. Greenewall,* 66 Miss. 360, 6 South. 156; *Pratt v. Cotton Co.,* 51 Miss. 470; *Gillenwaters v. Miller,* 49 Miss. 150.

J. W. Buchanan, for appellee.

In construing this contract of release the court must consider what were the grievances of the party then suing.

It is clear from the contract that it was the intention of the appellee to get release for all past and future damages that might be caused by appellee's line of road being maintained

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Brief for appellee.

and operated over his land. The things that were done by the appellee for W. L. Lackey at the time were to close up trestle No. 216, connect certain *barrow* pits as shown by the replication and to carry the water by a ditch to Town Creek. Whether it was two hundred or six hundred feet, the record does not clearly disclose.

As to what is meant by the words "During the continuance of the maintenance and operation of said railroad thereover as the same is now constructed" is the proposition for this court to pass on, and to do so correctly it is necessary to bring the common custom and usage of railroads in the maintenance and operation of the same.

The complaint is that the appellee here did not keep open the ditches on each side of its right of way through the appellant's land nor the ditch that carried the water from the west side through another trestle over Town Creek. Did any court, or anybody ever see the right of way ditches cleaned out on each side of a railroad as a part of the maintenance and operation of the railroad? And do the words "Maintenance and operation of a railroad" refer to the side ditches or does it have reference to the roadbed, trestle, cattle gaps and things of that character?

If it had been the intention of the parties to that contract, for the railroad company to keep its ditches on each side of the track cleaned out, and the ditches off of its right of way to Town Creek open and cleaned out, so that the water could get into Town Creek, its contract would have said so.

Is this contract to be construed to mean something that it does not say, because some sectionman, without the knowledge or consent of his superior officers, kept for a time, part of the ditches along its right of way open, and thereby bind the railroad company not only to keep the ditches on its right of way or edge of its right of way open, but also to keep up and maintain the ditch from its right of way over to Town Creek? If such had been the intention of the parties it could easily have been inserted in this contract, which we maintain has never

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been violated, and has been kept in good faith on the part of the appellee for a series of years, according to its very terms.

FLETCHER, J., delivered the opinion of the court.

We cannot agree with the learned court below that the contract between the appellee company and W. L. Lackey imposed no obligation upon the company to keep open the ditches which the contract mentions. It seems clear to us that, taking into consideration the situation of the parties, the mischief which was sought to be remedied and avoided, and the language of that part of the contract which recites that there is a release of all future damages that may accrue "on account of damage to the same and all that the same may sustain in any way by reason and during the continuance of the maintenance and operation of said railroad thereover as the same is now constructed," the company's duty demanded that the ditches should not be allowed to so fill up as to cause a recurrence of the trouble. It may be true, as ingeniously argued by appellee, that the language above quoted from the contract, if used in another connection, would be identical in meaning with the expression "proper construction and maintenance," as that term is employed in judgments rendered in condemnation proceedings; but we must construe the language in the light of this particular contract and the situation of the parties thereto. Certain it is that the contract would avail Mr. Lackey nothing, so far as future injuries are concerned, unless the ditches are kept open, and Lackey is without authority to go upon the railroad right of way for that purpose. Furthermore, weight must be given to the fact that for many years the company kept these ditches open, thereby giving a practical and contemporaneous construction to the contract in harmony with appellant's contention.

We are forced to conclude that the court erred in sustaining the railroad company's demurrer to the replication filed in answer to the second special plea, and the judgment is *reversed and case remanded.*

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Brief for appellant.

EX PARTE ETHEL PARKER.

[48 South. 297.]

CRIMINAL LAW AND PROCEDURE. *Punishment. County contract for working prisoners. Misdemeanant. Failure to pay fine and costs.*

A convicted misdemeanant, failing to pay the fine and costs imposed on him, must remain in jail, if the county has made no provision for the working of convicts, and the want of such provision does not entitle him to his liberty.

FROM the judgment of Chancellor, the HON. ISAAC T. BLOUNT, on habeas corpus, sitting at Pittsboro, Calhoun county.

Parker, appellant, was convicted of a misdemeanor in the circuit court of Calhoun county, was fined and sentenced to jail until the fine and all costs of the prosecution were paid. Failing to pay the fine or costs he was imprisoned in the jail of the county. Thereupon he petitioned Chancellor BLOUNT for a writ of *habeas corpus,* claiming that his imprisonment was illegal because the county had not provided for the working of convicts in any of the modes provided by law. Laws 1908, ch. 109, p. 104.

The chancellor heard the application, but remanded the applicant to jail, and the prisoner appealed to the supreme court.

J. L. Bates, for appellant.

The court is aware of the facts that prior to the meeting of the legislature of 1909 there was much public discussion as to what should be done with the county convicts and all agreed that the state should get them from under the control of county convict contractors and put them under the official control and management of the board of supervisors of the various counties. As we understand the act of the legislature of 1908 on the subject, it became the imperative duty of the board to do one of the many things therein provided, either work the county con-

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victs on a farm or farms, or on the public roads, or some other work of a public character, or in conjunction with a neighboring county on a farm or farms, or the board might order that all county convicts be confined in the county jail. It is certain that Calhoun county made no provision of any kind as to the working of the convicts on a farm or farms or on the public roads or any other public work of a public character, nor did it order the convicts to be confined in the county jail. If it was the imperative duty of the county to adopt one of the above plans for the working of county convicts and it failed to do so, can it be said that the relator must suffer for the criminal negligence of the county? Who is to blame? Must the helpless suffer for the neglect of a county? It was certainly the intent of the act of the legislature to put the official control and management of the county convicts under the board of supervisors of each county.

George Butler, assistant attorney-general, for the state.

Until the board of supervisors assumed jurisdiction of the convicts as provided in the act, they were to remain in the county jail. Section 4 of the Act of 1908 provides that the supervisors of the several counties may dispose of the county prisoners, etc. We think the case is too clear for argument.

FLETCHER, J., delivered the opinion of the court.

This relator, being convicted of a misdemeanor in the circuit court of Calhoun county, was sentenced to pay a fine and costs, and in default thereof to remain in the county jail.

It appears that the board of supervisors of Calhoun county has never undertaken to provide for the working of the county convicts in any of the modes provided by law; has made no order whatever on the subject of disposing of these convicts. Relator insists that he is entitled to his liberty because no such order has been made. We cannot so hold. In the absence of

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Brief for appellant.

any action by the board, the defaulting misdemeanant must remain in jail. We agree with the chancellor, that if any error has been committed, it was in favor of the relator, and of this he cannot complain. *Affirmed.*

NICHOLAS THOMPSON v. STATE OF MISSISSIPPI.

[48 South. 289.]

CRIMINAL LAW AND PROCEDURE. *Physical and mental infirmities of defendant. New trial. Newly discovered evidence. Burglary. Intent to rape.*

Where a defendant, unable to make defense or communicate with counsel assigned to defend him because of deafness and limited intelligence, was convicted of burglary with intent to rape, he should be granted a new trial upon the discovery by counsel after the trial of evidence tending to show his innocence.

FROM the circuit court of Monroe county.

HON. EUGENE O. SYKES, Judge.

Thompson, appellant, was indicted and tried for and convicted of burglary with intent to rape, sentenced to the penitentiary and appealed to the supreme court.

The facts are stated in the opinion of the court.

George C. Paine, for appellant.

It appears from the record in the case that the appellant was a deaf mute, and it was impossible to explain the charge to him. The attorney for the appellant objected for this cause to the trial proceeding. The objection was overruled and the appellant was placed on trial, absolutely helpless; being unable to hear or talk he was not given such a trial as the law contemplated. The fact that he was a deaf mute precluded him from exercising the right, under section 26 of the constitution, to demand the nature and cause of the accusation against him.

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Brief for appellee.

The fact that his counsel, Mr. Nabors, was present did not obviate the necessity of appellant hearing the nature and cause of the accusation against him. He could not read nor write nor talk, and no one can interpret for him. He could not be apprised of the charge against him, and could consequently offer no defense; being thus, circumstances and conditions, his trial was a mockery, and his constitutional right denied him.

The testimony is inconclusive of guilt.

Owing to his infirmities appellant should be granted a new trial, so that he may have the opportunity of demonstrating the truthfulness of the affidavit on which the motion for a new trial is based, and because of the newly discovered evidence.

George Butler, assistant attorney-general, for appellee.

The rule was in the early history of the law, that one born deaf and dumb was presumed to be an idiot. But we can see no reason why this presumption should ever have been indulged as to one not so afflicted from infancy and in fact it does not seem to have been so indulged. But according to the modern doctrine no such presumption exists even to those born deaf and dumb. 8 Am. & Eng. Ency. Law, 842; 1 Wigmore, 498.

The fact that a person is deaf and dumb does not of itself relieve him from responsibility for crime, if he have sufficient understanding to distinguish between right and wrong. 8 Am. & Eng. Ency. Law, 845; 1 Bishop, Crim. Law. 244.

We may grant for the purposes of this case that ordinarily one deaf and dumb is presumed irresponsible for crime, and still not affect this case. If upon arraignment the prisoner stood mute it was the duty of the court to enter a plea of not guilty for him, just as was done in this case and it is not necessary for a jury to ascertain if the prisoner stands mute of malice. True it is, if before or during the progress of the trial either from observation or on suggestion of counsel, facts are brought to the attention of the court raising a reasonable doubt as to the ability of defendant to make a just defense if he has one, by

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reason of the act of God, the question should be settled in a preliminary investigation. 10 Ency. Pl. & Pr. 1219. But where there is no such doubt in the mind of the court; it is under no obligation to have the matter so inquired into. It is a matter largely of discretion, and unless it affirmatively appears that discretion was abused it will not be reviewed. 10 Ency. Pl. & Pr. 1220 and cases cited in note.

FLETCHER, J., delivered the opinion of the court.

This appellant, twenty years old, was deaf, able to talk but poorly, and of limited intelligence. He stood mute when arraigned, and was not able to communicate intelligently with his counsel. He attempted no defense on the trial, and was naturally convicted. His counsel, in support of his motion for a new trial, made affidavit as to his client's condition, and asserted that since the trial he had discovered a number of witnesses who would disprove all the material parts of the state's testimony and establish defendant's entire innocence of the crime charged and proven. He satisfactorily accounts for his failure to produce this testimony on the trial, since his client was unable to communicate with him. In view of the unfortunate infirmities affecting this defendant, his total failure to make any defense, and the number of the witnesses and the character of the testimony which, according to the showing could be produced at another trial, we think the ends of justice demand that a new trial be granted, in order that opportunity be given defendant to establish his innocence, if he can.

Reversed and remanded.

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Syllabus.

GULFPORT COTTON OIL, FERTILIZER & MANUFACTURING COMPANY v. CHARLES W. RENEAU.

[48 South. 292.]

STATUTE OF FRAUDS. *Code* 1906, § 4775 (*d*). *Agreement not to be performed within one year. Contract of employment to begin in future. Memorandum. Several writings. Case.*

Under the statute of frauds, Code 1906, § 4775 (d), providing that an action shall not be brought whereby to charge a defendant or other party upon any agreement which is not to be performed within the space of one year from the making thereof, unless the promise or agreement, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some person by him or her thereunto lawfully authorized:—

(*a*) A verbal contract of employment to begin in the future and continue for one year thereafter is within the statute; and

(*b*) A memorandum of a contract, to make it enforceable, must include all the material matters of the agreement, so that resort to parol testimony will be unnecessary, except to show the situation of the parties and the application of the terms used in the writing to the subject-matter; and

(*c*) The memorandum must be signed as provided in the statute; and

(*d*) While the memorandum may consist of several distinct writings, and all of them need not be signed by the party to be charged, they must so relate that the one signed by the party to be charged can be held to be an approval of the unsigned ones in order to bind him to the terms of the contract set forth in them; and

(*e*) The statement in a letter from defendant, responding to one from the plaintiff detailing the terms of the unenforceable verbal contract of employment, in these words, "As for the talk I had with you when you applied for the situation, I expected much from you; that is why I offered you a large salary," was not a consent to the terms of the contract as detailed in plaintiff's letter, and the two writings did not take the case out of the statute; and

(*f*) The statute of frauds does not require that the writing shall be executed at any special time before it is offered in evidence.

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Brief for appellant.

FROM the circuit court of Harrison county.

HON. WILLIAM H. HARDY, Judge.

Reneau, appellee, was plaintiff in the court below, and the Gulfport, etc., Co., appellant, was defendant there. From a judgment in plaintiff's favor defendant appealed to the supreme court.

The facts are fully stated in the opinion of the court.

Money & Graham, Flowers & Whitfield and *George W. May,* for appellant.

The court below seems to have proceeded upon the idea that a verbal contract for more than a year is enforceable if the plaintiff does not depend altogether upon spoken words; and that he can recover if he can offer any corroborative written evidence that a contract was made. But the statute requires that the contract itself shall be in writing or some memorandum thereof sufficient in itself to evidence the contract in all its terms. *Waul v. Kirkman,* 27 Miss. 828; *McGuire v. Stevenson,* 42 Miss. 724, 730; *Frank v. Eltringham,* 65 Miss. 281, 3 South. 655.

The letters regarded for the present as being sufficiently connected to be treated as one writing do not contain the terms of the contract nor of any contract. It does not appear from these writings (1) what Reneau was to do, (2) where he was to work, (3) by whom he was to be paid, (4) how long he was to work, (5) whether his services were to be satisfactory to his employer, (6) whether he was to prove himself to be an expert machinist, (7) when his services were to begin. Not one of the substantial terms of the contract is plainly shown by these writings.

The statute requires the memorandum necessary to save a parol contract of this kind to be "signed by the party to be charged." Now the only writing which mentions the contract in the remotest way is the letter signed by Reneau of date May 18, 1907. It is not signed by Van Winkle, the president of the defendant corporation, the party to be charged. Van Winkle

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did not write this letter; he did not write out these references to the contract; he did not sign any writing containing these references. But it is insisted by the appellee that he is to be held to have, in effect, signed this writing simply because he answered the letter, as they say, and did not question the correctness of the reference contained in it. This is far-fetched.

We recognize the holdings of the courts to the effect that the writings may be in two or more papers and that the signature of the party charged need not be attached to the paper containing the terms of the contract. These holdings have invariably been made so far as we have been able to learn, in dealing with papers written while negotiations were going on about the making of a contract. They have most frequently been cases in which it appeared that the offers were made in one writing and acceptance in others. One referred to the other and was based upon the other and got its meaning from the other. They are cases where it was manifestly intended that one should refer to the other and where it was intended by the party charged to adopt the contents of the writing referred to just as if it were incorporated in the paper signed by him. There are cases, too, where the writing referred to is physically attached to the one signed.

But the case at bar is entirely different. Reneau had been discharged. He wrote a letter of complaint to the man who had employed and discharged him. At the end of his letter he mentioned the fact that he had a contract "by the year at a stipulated salary of $2,500 by the year." There was no occasion for Van Winkle to answer the same and say whether this reference to the contract was correct. It made no difference at that stage of the transaction whether the reference was correct. Van Winkle was not asked to say whether the statement in Reneau's letter was correct; the situation did not require him to express himself; and it cannot be assumed that he did intend to express himself. How could it make any difference

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to him whether Reneau correctly set out the terms of the contract or not? The contract was ended.

"It is not necessary that the memorandum should consist of a single instrument. Several and distinct writings may be construed together as containing all the terms of the contract though only one of them be signed by the party to be charged. But such separate writings must expressly refer to each other or be so connected physically or otherwise, as to show unmistakably that they relate to the same transaction. The general rule is that it is not competent to connect the several papers by parol, such evidence being admissible merely to identify one writing to which reference is made in another." 29 Am. & Eng. Ency. Law, 850.

The following are some of the cases decided by this court in which two or more writings have been dealt with: *Waul v. Kirkman,* 27 Miss. 826 *et seq.; Fisher v. Kulm,* 54 Miss. 480; *Jelks v. Barrett,* 52 Miss. 315, 322, 323; *McGuire v. Stevens,* 42 Miss. 315, 322, 323; *Rector Provision Co. v. Sawyer,* 69 Miss. 235, 13 South. 623; *Wilkinson v. Taylor etc., Manufacturing Co.,* 67 Miss. 231, 7 South. 356; *Frank v. Eltringham,* 65 Miss. 281, 3 South. 655.

We may rid ourselves of all complications and make it easy to see whether the contract sued on here is within the statute of frauds, simply by ignoring the oral testimony altogther, as to what the contract was, and examine the writings offered for the purpose of determining whether they embody the substantial terms of the agreement. When we do this we have nothing left to show the terms of the agreement, as is conceded by counsel for the plaintiff, except the statement in the letter of May 18, 1907, written by Reneau: "My contract with you was fixed by the year at a stipulated salary of $2,500 by the year and you offered as a further inducement that after removing the plant to Columbia you would make it more interesting to me by letting me take stock in the business;" and the statement in

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Brief for appellee.

the letter of May 20 written by Van Winkle: "As for the talk had with you, when you applied for the position, I expected much from you, that is why I offered you a large salary." Consider these two statements together and it cannot be seen what the contract was.

T. A. Hardy and *L. Brame,* for appellee.

It is always competent to show the situation and surroundings of the parties and other particulars in order to apply and construe a written contract. This is especially true where the contract is evidenced by several writings; as in the case of an agreement made by correspondence. The rule of admitting such testimony is one of necessity, and was in force long before the statute of frauds was enacted, and has been universally recognized and applied since the enactment of the statute. Neither this statute nor the rule forbidding parol evidence to vary or contradict a writing, excludes such testimony.

"Parol evidence is inadmissible to complete or vary an insufficient writing. But the surrounding circumstances may be shown by parol, and facts established from which the relation of several writings may be inferred." 12 Enc. of Ev. 7, citing among other cases *Hagan v. Domestic Sewing Machine Co.*, 9 Hun, N. Y. (16 Sup. Ct. R.) 73, and also *Beckwith v. Talbot,* 95 U. S. 289, which is a leading case cited in nearly all the authorities. See also our own cases of *Wilkinson v. Taylor Mfg. Co.,* 67 Miss. 231, 7 South. 356; *Tufts v. Greenwald,* 66 Miss. 360, 6 South. 156. In the case of *Beckwith v. Talbot* above, the supreme court of the United States uses the following language:

"It is undoubtedly a general rule that collateral papers, adduced to supply the defects of signatures of a written agreement under the statute of frauds, should, on their face, sufficiently demonstrate their reference to such agreement without the aid of parol proof. But the rule is not absolute. *Johnson v. Dodgson,* 2 Mees. & W. 653; *Salmon Falls v. Goddard,*

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14 How. 446. There may be cases in which it would be a violation of reason and common sense to ignore a reference which derives its significance from such proof. If there is ground for any doubt in the matter, the general rule should be enforced. But where there is no ground for doubt, its enforcement would aid, instead of discouraging, fraud."

In the light of this well established and reasonable rule, look at the facts. Van Winkle was the president and principal owner of an oil mill. Reneau, the appellee, was an oil mill man, his business being to manage oil mills, and he was skilled and experienced in that business. Van Winkle desired to employ him to manage his mill, and did so at an agreed salary of $2,500 per annum. Reneau went to work under the agreement and worked nearly a month, when, without cause, he was discharged. Thereupon on April 18, 1907, in answer to a letter of that date discharging him, he wrote Van Winkle a rather lengthy letter about this matter, among other things, stating therein as follows:

"My contract with you was fixed by the year, at a stipulated salary of $2,500 by the year and you offered as a further inducement that after removing the plant to Columbia, you would make it more interesting to me, by letting me take stock in the business."

In this letter he also asked for "a settlement." Two days later Van Winkle replied directly to this letter, making some complaint of the manner in which Reneau had discharged the duties, and among other things used the following language:

"As for the talk I had with you when you applied for the position I expected much from you. That is why I offered you a large salary."

He also stated in answer to the request for a settlement, that as soon as Mr. Danee would return "you can have an immediate settlement."

These letters bear inherent evidence of a reference, one to the other. No reasonable mind, after reading the whole of the

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Brief for appellee.

letters and knowing the relation and situation of the parties, would reach any other conclusion. The parol proof, which the court below admitted, was not for the purpose of adding to the terms of the agreement as set forth in this correspondence, but simply to apply the references in the letters, the one to the other, and to show the situation and relation to the parties and the surrounding circumstances.

In the case of *Wilkinson v. Taylor Mfg. Co.*, 67 Miss. 231, 7 South. 356, Judge CAMPBELL, speaking for the court on this subject, uses the following language:

"If the paper signed by the party to be charged makes such reference to the other writings as to enable the court to construe them together as constituting all the terms of the bargain, parol evidence is admissible to identify the paper referred to and apply the references. 1 Benji. on Sales, secs. 220, 221; Reed on Stat. of Frauds, sec. 341 *et seq.*"

In *Jelks v. Barrett*, 53 Miss. 315, cited by opposite counsel, a great deal of parol testimony was admitted for the purpose of showing the existence and identity of certain maps and other papers and what was done with them, and the relation and situation of the parties, and the court in that case held that the parol proof was competent and sufficient to connect the writings and apply the reference. In answer to the contention that this evidence was incompetent and in commenting on the testimony, the court among other things used the following language:

"That there should be some conflict and some presumptions necessary to be indulged, is unavoidable."

This case is cited by opposite counsel, but we consider it clearly an authority for our contention, as we think the principles applied to the facts are decisive of the question under discussion. There a great deal more parol testimony was admitted and considered than was offered in this case.

In the leading case of *White v. Breen*, 106 Ala. 159, 32 L. R. A. 127, the supreme court of Alabama, in a remarkably clear and philosophical discussion of this question, among other things, uses the following language:

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Brief for appellee.

"We are of opinion that when all the writings adduced, viewed together, in the light of the situation and circumstances of the parties at the time they were written, show unmistakably that they relate to the same matter and constitute several parts of one connected transaction, so that the mind can come to no other reasonable conclusion, from the evidence so afforded, than that they were each written with reference to those concurrent or preceding, then there is such a reference of the one to the other as satisfies the rule, although reference in express terms does not appear. The rule is one founded in reason; and when, as practical men, we look at the writings, and see, inhering in them evidence which entirely satisfies the mind that they all relate to one general transaction, there is no reason why they should not be so considered. There is in such case a direct reference of the one to the other, within the meaning of the law. The application of the principle to the facts of this case will illustrate our meaning. The case of *Beckwith v. Talbot*, 95 U. S. 289, 24 L. Ed. 496, aptly illustrates it.

As we understand the rule, it is not necessary that the reference between the writings shall be direct, or in express terms. It is sufficient, if, in viewing the whole of the correspondence, it reasonably appears that it relates to "one general transaction."

It must not be forgotten that the appellee went to work under the contract and worked nearly a month, and this practical construction by the parties is to be considered as an aid in upholding the agreement. As another aid, we invoke the principle expressed in the maxim *ut res magis valeat, quam pereat*, which requires that the contract be upheld, rather than defeated, if this can be done by reasonable construction and by the application of well-known presumptions and implications of law.

Another principle which has direct application is that expressed by the maxim *id certum quod certum reddi potest*. These principles are as old as common law itself. They were in force long before the statute of frauds was enacted in England, and the statute has always been construed and applied in

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the light of these and other well-known principles of the common law.

The laborer is worthy of his hire.

Argued orally by *J. N. Flowers,* for appellant, and by *T. A. Hardy,* and *L. Brame,* for appellee.

FLETCHER, J., delivered the opinion of the court.

On the 20th day of April, 1907, appellee entered into a verbal contract with appellant, acting by one Van Winkle, its president, to take charge of the company's oil mill in Gulfport as superintendent of the operating department. Appellee held himself out as a skilled and experienced man in such matters, and Van Winkle agreed to pay him an annual salary of $2,500; the term of service to begin on April 24th and, according to appellee's contention, to continue for one year. There were certain other inducements and representations dealing with appellee's status and privileges, in case the plant should be removed to Columbia, which we need not here notice in detail. Appellee on the 24th of April entered upon the discharge of his duties according to the terms of his contract, and was shortly thereafter discharged by Van Winkle without just cause. He was paid for the short time during which he worked, reduced his damages as much as possible, as he was bound to do under the law, and brought suit for the difference between what he had been able to earn during the year and the $2,500 which Van Winkle had promised to pay him. Under a peremptory instruction from the court, Reneau was given judgment for $1,350, and this amount is admittedly correct, provided any liability at all exists.

It will be observed that the contract was a verbal one, made on April 20th, to begin on April 24th, and to continue for one year, and is, therefore, unless affected by the letters to be hereafter adverted to, within the inhibition of that clause of the statute of frauds which provides that an action shall not be brought whereby to charge a defendant or other party upon any agree-

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ment which is not to be performed within the space of one year from the making thereof, unless the promise or agreement upon which such action may be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith. Indeed, the record before us contains the following recital: "It is admitted by the plaintiff that the contract testified to by the plaintiff is within the statute of frauds and non-enforceable in this state, unless the letters filed as exhibits to the declaration in said case and the letters introduced in evidence in this case are sufficient memorandum to take the same out of the operation of the statute of frauds, together with any competent oral evidence introduced in said case."

It will thus be seen that the case turns entirely upon the question whether the letters introduced, taken together, contain such a memorandum or note of the contract as will satisfy the statute. The letters referred to were written under these circumstances: After appellee had been discharged, he addressed a letter to Van Winkle, protesting against the treatment he had received, explaining the cause of the unsatisfactory condition of the product of the mill, and reminding Van Winkle of the fact, and at least some of the terms, of the contract. This letter was dated May 18th, and, among other things mentioned, Reneau refers to the fact that he had made no misrepresentation when he had held himself out as thoroughly understanding the oil mill business. The letter then recites: "My contract with you was fixed by the year at a stipulated salary of $2,500 by the year, and you offered as a further inducement that, after removing the plant to Columbia, you would make it more interesting to me by letting me take stock in the business." On May 20th Van Winkle addressed a letter to Reneau, which does not in so many words acknowledge receipt of Reneau's letter, but does discuss the questions raised by Reneau. Among other things mentioned in this letter is this expression: "As for the talk I had with you when you applied for the position, I expected much from you. That is why I offered you a large salary."

It is insisted on behalf of the appellee that these two letters,

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taken together, satisfy the statute, and on behalf of the appellant that they come far short of doing so. Appellant's attack upon the sufficiency of these letters may be said to have three aspects: First, that the letters cannot be connected, since there is no direct reference in one to the other; second, that, if considered together, they do not set out all the terms of the contract, so as to render unnecessary any resort to parol evidence; third, that the letter signed by Van Winkle does not sufficiently show the author's assent to and adoption of the statements made in Reneau's letter.

We do not think it necessary in this case to devote much time to the first two points. Suffice it to say that we think Van Winkle's letter bears such internal evidences of having been written in reply to Reneau's that their connection sufficiently appears, although there is no express acknowledgment in the one of the receipt of the other. We observe, on the second ground, that there is some force in the contention that the letters, when taken together, do not furnish a complete memorandum of the contract, since nothing is better settled than that the writing must include all the material features of the agreement, so that no resort to parol testimony is necessary, further than to show the situation of the parties and the application of the terms employed in the writing to the subject-matter under consideration. It may well be doubted whether these letters measure up to this requirement; but we do not feel called upon to decide this question.

We come to the third, and, as we think, controlling, feature of this case. Of course, by the very terms of the statute the memorandum must be signed by the party to be charged. In this case, before appellant can be held, it must appear that Van Winkle has approved, assented to, and adopted as his own the statements made in Reneau's letter as to the terms of the contract. We, of course, readily assent to the well-understood principle that the memorandum may consist of several distinct writings, provided they are so related that the particular paper

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signed by the party to be charged can be held to be an approval of other documents in which the terms of the contract are set forth, even though such other writings are signed by others. The reports abound in cases of this sort. But the question here is whether the case at bar falls within this principle. It must be remembered that these letters are written after the breach of the contract. This fact is of value, not because as a matter of law the memorandum must be executed before the making of the contract, or contemporaneous therewith, for the authorities are well enough agreed that the memorandum may be executed after the breach, but as an important factor in determining what effect shall be given to the language employed. We can readily understand that, when parties are engaged in negotiating for a contract, any reply which one may make to a proposal of the other must be deemed as responsive thereto, since the reply marks a step either forward or backward in the progress of the negotiation. But it is a different matter when a contract already made and breached is sought to be confirmed by an interchange of letters. In such a case, when the one not sought to be charged states the terms of the contract, the other must manifest his assent thereto in some manner which clearly evidences his acquiescence in the statement. We are not to be understood as holding that he must sign with the intent to charge himself under the statute of frauds. We agree that his intention is immaterial. But he must adopt his adversary's statement.

We cannot think the letter written by Van Winkle under date of May 20th measures up to this requirement. Reneau's letter, we may concede, states the contract. To this Van Winkle merely replies that, "as for the talk I had with you when you applied for the position," etc. Can this be held as the equivalent of saying," I agree that you have stated all the terms of the contract correctly?" We think not. True, Van Winkle enters no specific denial; but he was not called upon to deny. Had he made no reply to the letter, he would not have been bound. What he did sign does not show his assent to the terms stated

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by Reneau. It can mean nothing more than that, conceding what Reneau said to be true, he (Van Winkle) had not secured the results which he expected. It neither affirms nor denies the correctness of Reneau's declaration. It does no more than to waive his version aside, without committing the writer to its terms. It refers to "a talk;" but it does not say that "you have represented this 'talk' correctly." It cannot, for the purpose of satisfying the statute of frauds, be given the effect of a plea in confession and avoidance; nor can a person bring himself within the statute by conduct such as would operate as an estoppel in many other cases. In this case the statute is far from being satisfied.

It does not with sufficient certainty appear that Van Winkle assented to the terms of the contract, and we cannot enforce it. We are content with the authorities cited by counsel, and do not reproduce them here.

Reversed, and cause dismissed.

SAMUEL H. LOWENBERG ET AL. v. LEWIS-HERMAN COMPANY.

[48 South. 517.]

1. AGRICULTURAL LIENS. *Civil Code of Louisiana, art. 3217. Mortgage creditor.*

Where cotton raised in Louisiana, and under the laws of that state, Civil Code, art. 3217, subject to a statutory lien to secure a debt due for plantation supplies, superior to all mortgages not given to secure a like debt, was by the owner delivered in this state in payment of the debt so secured, a creditor whose debt, not of the same character, was secured by mortgage thereon has no right to complain of the transaction.

2. PARTNERSHIP. *Partner as agent.*

Where a member of a partnership which conducted a plantation was placed in charge as manager, his contract for supplies to be used in making a crop bound the partnership, especially since his purchases for the preceding year were ratified.

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Brief for appellants.

FROM the chancery court of Adams county.

HON. J. S. HICKS, Chancellor.

The Lewis-Herman Co., a corporation, appellant, was complainant in the court below; Lowenberg and another, appellees, were defendants there. From a decree in complainant's favor the defendants appealed to the supreme court.

The facts are fully stated in the opinion of the court.

Ratcliff & Truly, for appellants.

The mortgage held by complainants on the crops to be grown on a plantation in Louisiana for an antecedent debt was absolutely null and void. The laws of that state do not recognize a mortgage on a crop to be grown for anything other than advances to be made to produce and market the crop and the mortgage in this case specifically says on its face that it is for the purpose of additional security for an antecedent debt, excluding the idea that it was intended to cover any advance to be made in the future or the making or the marketing of the crop of 1904. But if we concede the validity of the mortgage as between the parties to it, the defendants claim that they had what is known in the jurisprudence of Louisiana as a privilege on said crop, which is a lien superior to any other for advances made to make and market the crop. "If a privilege exists it is in itself higher than a mortgage and must of necessity be paid before and in preference to the mortgage and if the mortgagee admits the existence of the privilege it subordinates his mortgage." 31 La. Ann. 518. All the pleadings in this case and all the rights contended for by complainants are based upon their supposed rights under this mortgage. It is conceded, at least not denied, that defendants advanced the necessary supplies to make and market the crop which was shipped to them and which is the subject-matter of this suit, therefore they had a superior right to this cotton to the complainants or any one else. But complainants say while that is true, while they admit we have a superior right to their mortgage by reason of our privilege,

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Brief for appellee.

that Farr, one of the partners, never consented that the advances should be made or that the cotton should be shipped to defendants. We answer this argument by saying that Farr's consent was wholly unnecessary. Clower was in full charge, known to be so by Farr, was put there by him to manage and control and arrange the supplies of the place. The complainant knew it and paid checks signed by Clower for the account of the "Hedgeland" plantation, and Clower bought all the supplies, managed the whole plantation and controlled and shipped all the cotton, not only for the year 1904 but for previous years.

The lien given by the laws of Louisiana and called there a privilege need not be recorded, but it corresponds very much to our landlord's lien in this state for rent and supplies. 32 La. Ann. (2nd vol.), 2139.

It is incomprehensible to us that a factor in Mississippi who advances a planter in the state of Louisiana for the purpose of making a crop and who is by the laws of that state given a superior lien to all other liens on the crops grown that year and who would have the right in Louisiana to take possession of that crop against all comers and when the maker or grower of that crop should deliver it to the Mississippi factor, that any ordinary unsecured creditors could come in and deprive him of the possession of it.

A. M. Pepper, for appellee.

The decision of this court is clear and uniform that statutory liens, like other statutory rights, extend no further than the state line and give no action or lien in reference to crops so covered after it has crossed the state line. *Chism v. Thompson,* 73 Miss. 415; *Hernandez v. Aaron,* 73 Miss. 436; *Millsaps v. Tate,* 75 Miss. 153.

While original bill charges cotton was grown and shipped to appellant by Clower & Farr, this was denied in the answers to original and amended bills and the transaction stated to have been with Clower alone without Farr being known and was so

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conceded in appellee's answer to cross-bill and established by the evidence. Authority of planting partners is much more limited than that of mercantile concerns and requires those dealing with the partner to ascertain his authority or act at their peril; and prevents the diversion of crop by one partner from a secured to an unsecured debt, without such partner's consent. *Prince v. Crawford,* 50 Miss. 344; *Morgan v. Pierce,* 59 Miss. 210.

Even as to mercantile partnership such dealings have been held invalid.

"The authority of a partner is limited to those things done in the regular course of the business of the firm; outside of this he has no authority." Parsons on Part. 163. "If he sells the whole, or part of the assets, with intent to apply the proceeds to his own use, and thereby defraud his partner, if the purchaser from him has knowledge of such intent, or if the transaction was attended with such circumstances, as would have imparted knowledge, but for his gross negligence, then the purchaser's title is affected and vitiated." Parsons on Part. 169. "If the attempt be to mortgage or assign, and this be done in an unusual way, or under suspicious circumstances, such an act would be of no effect as against the party injured thereby." Ib. and cases cited.

"A transfer by a partner of the joint effects, in fraud of a co-partner, will constitute the transferree, who received with such notice or without consideration a trustee for the benefit of the firm or its creditor." *Stegall v. Coney,* 40 Miss. 769.

As we have pointed out, one of appellants admitted he knew of Farr's interest in Hedgeland and that no notice of his dealings with Clower were ever communicated to Farr or appellee otherwise than by the writings in evidence which show that nothing was mentioned, except what had been already done.

The only co-partnership property was Hedgeland, the whole of the Mississippi property being operated by Farr, and the general account kept against him. The land owned by Clower in Mississippi was included in the Farr business, constituting,

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apparently, the basis and security for such contributions as he had made towards payment of Hedgeland. In any event, the whole Mississippi business was operated as Farr's. (Tr. 131-2, 137-8, 140).

Argued orally by *E. H. Ratcliff,* for appellants, and by *E. M. Pepper,* for appellee.

FLETCHER, J., delivered the opinion of the court.

On the 16th day of January, 1904, Geo. W. Farr and J. M. Clower, owners of a certain plantation situated in Catahoula parish, La., known as "Hedgeland," were indebted to the Lewis-Herman Company, a corporation domiciled at Lexington, Miss., in the sum of $28,000. To secure the payment of this debt Farr and Clower on January 18, 1904, executed a deed of trust to the Lewis-Herman Company conveying certain property in Holmes county, Miss., as well as the crops to be grown on such property. This trust deed was so drawn as to cover all the future advances that might be made during the year. At the same time, or practically contemporaneous therewith, Farr and Clower executed a Louisiana mortgage on the Hedgeland plantation and all crops to be grown thereon, which was declared to be an additional security to the Holmes county trust deed. There was nothing in this mortgage to show that the money declared to be due was any part of it to be expended in furnishing supplies to the Hedgeland plantation for the year 1904. This mortgage was duly recorded in Catahoula parish. Clower was placed in charge of Hedgeland plantation as manager, and during the year 1904 bought supplies for the plantation from S. H. Lowenberg & Co., merchants doing business in Natchez, Miss., to the amount of some $3,700. At the close of the crop season of 1904 Clower delivered to Lowenberg & Co. sufficient cotton grown on Hedgeland to pay this debt. Whereupon the Lewis-Herman Company, claiming that this cotton was covered by their mortgage, filed this bill against Lowenberg & Co. to recover

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the value of the cotton. From a decree in favor of complainant, Lowenberg & Co. appeal. The voluminous record in this case abounds in immaterial matters much discussed in the pleading, the proofs, and the briefs; but the above statement is thought to contain all that is really important in this controversy.

It would seem to be well settled that under the laws of Louisiana Lowenberg & Co. have a lien on the cotton raised on the Hedgeland plantation which is superior to any mortgage lien not given for plantation supplies. This lien is called in the law of Louisiana a "privilege," and exists in favor of the supply merchant, though not recorded. Civ. Code La. art. 3217; *Weill & Co. v. Kent et al.*, 52 La. Ann. 2139, 28 South. 295. There can be, therefore, no room for doubt that the claim of Lowenberg & Co. under their lien is superior to the claim of the Lewis-Herman Company under their mortgage. It seems to be conceded in the brief of appellants that this view is correct, provided the crops had remained in Louisiana, and provided Clower had power to bind the partnership; it being shown that Farr had not acquiesced in the purchase of the supplies from appellant. That Clower's contracts for supplies to be used in making a crop on the plantation of which he was in sole charge as manager are binding on the partnership seems to us too clear for disputation, especially in view of the fact that Clower's purchases for the previous year had been recognized and settled. We fully recognize the distinction between the so-called "planting partnership" and mercantile or commercial partnerships; but the transaction in question falls within the rule laid down by Judge STORY and cited with approval in *Prince v. Crawford*, 50 Miss. 344; that is to say, the authority of Clower, both in his capacity as partner and as agent for Farr, is "implied by the usages of the business or the ordinary exigencies and objects thereof."

But it is said that Lowenberg's lien stopped at the Mississippi river; that it had no extraterritorial force, and is of no

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avail after the property was removed to Mississippi. And to support this view, reliance is placed in *Chism v. Thomson,* 73 Miss. 415, 19 South. 210; *Hernandez v. Aaron,* 73 Miss. 436, 16 South. 910, and *Millsaps v. Tate,* 75 Miss. 153, 21 South. 663. If it be true that Lowenberg's lien stopped at the state line, it may be interesting to inquire why it is not equally true that appellee's lien stopped at the same place. Both may be considered as having liens; appellants a "privilege" under the laws of Louisiana, and appellee a "conventional mortgage" under the laws of that state—appellant's lien being superior. In this attitude of affairs Clower, the manager in charge and a member of the firm, delivers the cotton to the superior lien holder, who actually receives and applies the cotton to the secured debt. Appellee can derive no consolation from the cases cited. In *Hernandez v. Aaron* the mortgage creditor was defeated in favor of the supply merchant because the mortgage lien stopped at the state line, and the cotton factor in New Orleans actually received the cotton from the debtor; and precisely to the same effect is *Chism v. Thomson.* In *Millsaps v. Tate* the superior lien of the landlord was subordinated to the lien of a mortgage creditor when the cotton was shipped out of the state and actually delivered to such creditor. This case should be examined from the viewpoint of a person residing in Louisiana and shipping cotton into Mississippi, since Clower was located in Louisiana, temporarily at least, and dealing with crops grown in that state and subject to its laws. Lowenberg had the better lien, secured the cotton, which never became subject to appellee's mortgage lien, and must prevail. Of course, no importance can be given to the bill of sale executed by Farr and Clower long after the cotton was delivered to appellants.

The decree is *reversed, and the bill dismissed.*

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SARAH E. JOHNSON ET AL. v. BRIDGET G. STANCELLE ET AL.

[48 South. 619.]

WILLS. *Insanity apparent from the instrument. Suicide. Supreme court practice.*

Where an alleged will, drawn in contemplation of suicide, contains matters irreconcilable with all theories of sanity and was manifestly the product of a mind wholly devoid of testamentary capacity, it should be adjudged void, and the supreme court will reverse a decree probating such an instrument.

FROM the chancery court of Hancock county.

HON. THADDEUS A. WOOD, Chancellor.

Mrs. Johnson and others, appellants, were complainants in the court below; Mrs. Stancelle and others, appellees, were defendant there. From a decree probating a will the complainants, the widow and children of the alleged testator, appealed to the supreme court.

In view of the opinion of the court it is deemed improper to state the contents of the alleged will and unnecessary to make a statement of the facts of the case.

McDonald & Marshall and *Longino & McDowell,* for appellants.

E. J. Gex and *Flowers & Whitfield,* for appellees.

Argued orally by *J. R. McDowell,* for appellants, and *A. H. Whitfield, Jr.,* for appellees.

FLETCHER, J., delivered the opinion of the court.

An examination of the will attempted to be executed by Johnson, alias Jacobs, convinces us that it was the product of a mind so completely shattered that testamentary capacity was wholly lacking. The document was evidently drawn in contemplation of immediate suicide, and the unprintable nonsense it contains cannot be reconciled with the theory of sanity. We deem it un-

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necessary to review the evidence. The eccentricities shown to have marked Johnson's earlier life may be consistent with testamentary capacity; but it is our view that at the time the alleged will was written these eccentricities had developed into general insanity. Reluctant as we are to disturb the chancellor's finding on the facts, we cannot sanction a disposition of property resting on such a document.

The case is reversed and remanded, with directions to the chancery court to enter a decree setting aside the probate of the will. *Reversed.*

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2. OPEN ACCOUNT. *Code* 1906, § 1978. *Unascertained credit*

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Where a personal action is brought against a contractor by a materialman for a balance due, and the owner of the building is joined, and an attempt is made to establish a materialman's lien, but no personal judgment is sought against the owner, it cannot be urged, on appeal from an instruction to find for the owner, that the evidence established an independent contract between the owner and the materialman to pay for the material furnished, as the issues on appeal must be the same as those made in the lower court. *Vicksburg Mfg., etc., Co. v. Construction Co.*, 282.

6. JUDGMENTS. *Want of notice. Justice of the peace. Circuit court.*

A defendant against whom a judgment has been rendered in a justice's court without notice, may assail its validity on direct appeal to the circuit court. *Adams v. Insurance Co.*, 433.

7. CROSS APPEAL. *Cross assignment of error. Must be seasonable.*

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Under Code 1906, § 83, providing that an appeal from the judgment of a justice of the peace to the circuit court must be prosecuted within five days after the rendition of the judgment, a failure to deliver an appeal bond to the justice of the peace within that time is not excused by the fact that a proper bond was mailed to the justice of the peace and should have reached him in due course of mail before the expiration of the five days, where it was not received until afterwards because of his absence from home. *Typewriter Co. v. Taylor*, 584.

9. DAMAGES. *Code* 1906, § 4926. *Value of land.*

An unsuccessful appeal from a decree cancelling a deed to land and awarding possession, entitles the appellee, under Code 1906, § 4926, so providing, to recover damages, five per centum on the value of the land. *Allur v. Luckett*, 868.

ARGUMENT.

1. CRIMINAL LAW. *Prosecuting lawyer. Improper argument. Harmless error.*

A statement by the prosecuting lawyer, in argument to the jury, to the effect that more murders had been committed in the county than elsewhere in the state, and that it was high time for the juries to put a stop to them, does not constitute reversible error where upon objection the court advised the jury that it was improper and should be disregarded. *Jackson v. State*, 83.

2. SAME. *Witnesses. Husband and wife. Failure of husband to call wife. Improper argument.*

The failure of the husband to call his wife as a witness for him in a criminal case is not a proper subject of comment by counsel. *Johnson v. State*, 91.

3. SAME. *Improper argument. Character. Evidence. Failure to offer.*

It is improper in a criminal case for a prosecuting lawyer to comment in his argument to the jury upon defendant's failure to offer evidence of her previous character; and, proper objection being ineffectually made thereto, it is reversible error unless defendant's guilt be overwhelmingly shown. *Turner v. State*, 458.

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ASSAULT.

(With intent to ravish.)

1. CRIMINAL LAW AND PROCEDURE. *Rape. Evidence. Particulars. Hearsay not admissible.*

In a prosecution for an assault with intent to rape, it is competent for the state to show that the prosecutrix complained soon after the asault, but the particulars of her complaint and of the offense as narrated by her are not admissible in evidence. *Frost v. State*, 104.

2. SAME. *Code* 1906, § 1359. *Indictment. Chaste character of woman.*

In order to convict under Code 1906, § 1359, providing that any person convicted of an assault with intent to ravish a woman of previous chaste character shall be punished by imprisonment in the penitentiary for life, or for such time as may be fixed by the jury, the indictment must charge the previous chaste character of the woman. *Ib.*

3. SAME. *Rape. Indictment. Code* 1906, § 1359. *Ex post facto law. Code* 1892, § 967.

An indictment predicated of Code 1906, § 1359, a new statute making it a felony, punishable by imprisonment for life or such shorter time as the jury may fix, to assault with intent to forcibly ravish any woman of previous chaste character:—

(*a*) Cannot be maintained by proof of acts committed before the statute became operative; nor

(*b*) Be referred to Code 1892, § 967 (re-enacted Code 1906, § 1043), in force at the time of the acts, making it a felony, punishable by imprisonment not exceeding ten years, to assault a woman with intent to ravish her. *Barton v. State*, 375.

ASSIGNMENT.

1. ASSIGNMENT. *Building agreement.*

A person who contracts to erect a building for another has the right to assign the money due or to become due to him from the owner on the contract. *Spengler v. Lumber Co.*, 780.

2. SAME. *Same. Assent of debtor. Necessity.*

The assent of the owner to an assignment by a building contractor of the money due and to become due on the contract is not essential to the validity of the assignment. *Ib.*

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ASSIGNMENT—*Continued.*

3. MECHANIC'S AND MATERIALMAN'S LIEN. *Assignee of contractor. Subcontractors. Materialmen. Laborers. Code* 1906, § 3074. *Priority of liens.*

Under Code 1906, § 3074, giving to subcontractors, materialmen and laborers a lien on the amount due by the owner to the contractor upon their giving notice to the owner, an assignee of the principal contractor has the prior right to the fund as against subcontractors, materialmen and laborers serving notice after the assignment. *Spengler v. Lumber Co.*, 780.

4. SAME. *Assignment of principal contract. Effect.*

Where a building contractor transferred to a third person the balance due under the contract to secure advancements to aid in the construction of the building, and thereafter the owner paid the sums due on the contract to the assignee, the transfer was an assignment of the funds due and to become due under the contract, but not of the contract itself, and the assignee occupies no relation towards persons furnishing material and labor in the construction or completion of the building. *Ib.*

5. SAME. *Same.*

That the assignee of a building contractor, to whom the balance due and to become due from the owner had been transferred, consented to materialmen and laborers furnishing material and labor in the construction of the building did not affect his rights under the assignment. *Ib.*

6. SAME. *Same.*

The right of a subcontractor, materialman or laborer, under Code 1906, § 3074, to a lien on the amount due from the owner to the principal contractor on giving notice to the owner as provided in the statute, is defeated by a *bona fide* assignment by the contractor of the balance due and to become due under the contract, made before the service of such notice, although the assignee did not give them notice of the assignment. *Ib.*

7. SAME. *Same. Contractor's outside creditor.*

An assignment by a building contractor of the balance due and to become due under the contract for a debt due to the assignee from the assignor, not growing out of the construction of the building, is good as against subcontractors, materialmen and laborers subsequently serving notice on the owner. *Ib.*

ASSESSMENT.

TAXATION. *Description of property. "Capital invested in merchandise and manufacturing."*

An assessment for taxation of a waterworks company for "capital invested in merchandise and manufacturing" includes its pipes,

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ASSESSMENT—*Continued.*

hydrants, etc., but not its solvent credits. *Adams v. Waterworks Co.*, 601.

MUNICIPALITIES. *Taxation. Changes in values. Code* 1906, § 3422.

Under Code 1906, § 3422, authorizing municipal authorities, at a regular or special meeting held in September or October of each year, to increase or diminish the value of property as assessed for municipal taxation, changes of assessment values made by a municipality after the end of October are void, although made at a meeting held pursuant to an adjournment in October. *Biloxi v. Real Estate Co.*, 653.

ATTACHMENTS.

1. NONRESIDENT DEFENDANTS. *Garnishments. Jurisdiction. Efforts to procure.*

The debtor of a nonresident cannot, without the consent and against the wishes of his creditors, deposit the sum due in a bank to the credit of a nonresident for the purpose and thereby confer jurisdiction of an attachment suit against the creditor on a court of the bank's domicile. *Saxony Mills v. Wagner*, 233.

2. FOREIGN CORPORATIONS. *Process. Code* 1892, § 3433, *Laws* 1894, *ch.* 61, *p.* 49. *Doing business in state.*

A foreign trading corporation having no office or place of business in this state but employing a soliciting agent to obtain orders and send them to the home office, where they are filled by shipments direct to the purchasers, is not doing business in this state, within the meaning of Code 1892, § 3433, amended Laws 1894, ch. 61, p. 49, providing for the service of process on corporations; nor is its soliciting agent "an agent" upon whom process against it can be served. *Ib.*

RECEIVERS. *Attaching creditors. Priority.*

Where an attaching creditor, after judgment in his favor, moved the chancery court for an order directing its receiver, having custody of the attached and other property of the defendant, to pay his debt or release the property attached, it was not error to deny his motion, in the absence of all evidence touching liens thereon in favor of other creditors, although the attachment was levied before the receiver was appointed. *Adams v. Bank*, 595.

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ATTORNEYS' FEES.

1. CHATTEL MORTGAGES. *Promissory note. Attorney's fees. Purchaser of encumbered chattels.*

Where a promissory note, stipulating for the payment of an additional sum as an attorney's fee in case of its being placed in the hands of an attorney for collection, was secured by a recorded chattel mortgage, a purchaser of the chattels from the mortgagors acquires them subject to a lien securing the attorney's fee as well as the original fee, although the recitals of the mortgage descriptive of the note do not mention any promise to pay an attorney's fee. *Tubberville v. Simpson*, 154.

2. DEEDS OF TRUST. *Trustee's fees. Attorney's fees.*

Where a note promising to pay an attorney's fee in case it is placed in the hands of an attorney for collection is secured by a deed of trust, it is proper to charge a fee on sums collected by an attorney before sale under the deed and on sums collected by him after litigation, but not on sums collected by the sole efforts of the trustee, to whom trustee's charges were paid, although turned over to the attorney.

BAILMENTS.

1. WAREHOUSEMEN. *Injury to goods. Limitation of liability. Adjustment before removal of property. Waiver of provision.*

Where the dealings between warehousemen and the owners of cotton stored with them showed that the parties had disregarded a provision in the warehouse receipts that all claims for damages against the warehousemen should be adjudicated before the cotton was removed, the provision could not be set up as a defense by the warehousemen in an action for damages brought after the removal of the cotton. *Compress Co. v. Atkinson*, 93.

2. SAME. *Receipts. Construction. Fire and water exception.*

A clause in a warehouse receipt exempting the warehousemen from liability for loss by fire and water did not cover damage from exposure to the ordinary action of the elements, but related to damages from some disaster produced by fire or flood in the nature of an overwhelming catastrophe. *Ib.*

3. SAME. *Damage to goods. Action for. Evidence.*

In an action for damages to certain lots of cotton, described in a bill of particulars, while stored in defendant's warehouse, each bale of which was evidenced by a separate compress receipt, testimony showing the damage to all the cotton, and identifying the

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BAILMENTS—*Continued.*

damaged bales as the identical cotton delivered to defendant and described in the bill of particulars, and that the damage resulted through defendant's negligent handling of it, was sufficient, and it was not necessary to prove the particular damage to each separate bale. *Compress Co. v. Atkinson*, 93.

4. SAME. *Goods destroyed. Fire. Negligence. Burden of proof.*

In an action against a warehouseman for the value of goods destroyed in a fire which burned the warehouse, the burden is on the bailor-plaintiff, in the absence of proof as to the circumstances of the fire, to show that it resulted from the bailee defendant's negligence. *Railroad Co. v. Hughes*, 242.

BASTARDY.

MARRIED WOMAN. *Code* 1906, §§ 268 *et seq.*

A woman cannot maintain bastardy proceedings against the father of her illegitimate child under Code 1906, §§ 268 *et seq.*, governing such actions, if she be married at the time of its birth, although deserted by her husband. *Welch v. Cleburne*, 443.

BILLS AND NOTES.

1. CHATTEL MORTGAGES. *Promissory note. Attorney's fees. Purchaser of encumbered chattels.*

Where a promissory note, stipulating for the payment of an additional sum as an attorney's fee in case of its being placed in the hands of an attorney for collection, was secured by a recorded chattel mortgage, a purchaser of the chattels from the mortgagors acquires them subject to a lien securing the attorney's fee as well as the original fee, although the recitals of the mortgage descriptive of the note do not mention any promise to pay an attorney's fee. *Tubberville v. Simpson*, 154.

2. DEEDS OF TRUST. *Trustee's fees. Attorney's fees.*

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3. PROMISSORY NOTES. *Failure of consideration.*

A failure of consideration is a good defense to a suit on a promissory note between an endorser, having no greater rights than a payee, and the maker, and defendant should not be unduly restrained in making it. *Hayle v. Shirley*, 466.

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BILLS OF LADING.

See CONTRACTS AND RAILROADS.

BONDS.

1. SUITS ON. *Open accounts. Code* 1892, § 1801. *Code* 1906, § 1978.

A suit upon a bond is not within Code 1892, § 1801 (Code 1906, § 1978), authorizing the proof of open accounts by affidavits, although the damages recoverable for a breach of the bond be the value of goods charged in the account. *Adams v. Insurance Co.*, 433.

2. JUDGMENTS. *Want of notice. Justice of the peace. Appeal. Circuit court.*

A defendant against whom a judgment has been rendered in a justice's court without notice, may assail its validity on direct appeal to the circuit court. *Ib.*

3. JUSTICES OF THE PEACE. *Appeal bond. Time for approval. United States mail.*

Under Code 1906, § 83, providing that an appeal from the judgment of a justice of the peace to the circuit court must be prosecuted within five days after the rendition of the judgment, a failure to deliver an appeal bond to the justice of the peace within that time is not excused by the fact that a proper bond was mailed to the justice of the peace and should have reached him in due course of mail before the expiration of the five days, where it was not received until afterwards because of his absence from home. *Typewriter Co. v. Taylor*, 584.

4. RAILROAD BONDS. *Construction.*

Bonds and mortgages securing them, written in unambiguous terms, are to be construed like other writings and their meaning cannot be varied by precedent agreements between the parties. *Railroad Co. v. Martin*, 700.

5. SAME. *Income bonds. Priority.*

Railroad income bonds, issued without coupons attached, drawing such interest, not exceeding six per centum per annum, as the road's earnings might pay after satisfying operating expenses, interest on "such other bonds as shall from time to time be outstanding and such amounts as may be prescribed to be paid to or towards sinking funds for the redemption thereof," are subordinate to all outstanding bonds of the company and not merely to the first mortgage bonds, although a previous suit by the holders of the income bonds seeking to have them adjudged su-

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BONDS—*Continued.*

perior to all other bonds except those secured by the first mortgage was compromised by additionally securing the income bonds (without changing their terms), and indorsing that fact upon them. *Railroad Co. v. Martin*, 700.

BOOKS.

EVIDENCE. *Books showing business transactions.*

An entry made in a book used for that purpose by one person in the regular course of business, recording an oral or written report made to him by another in the regular course of business, of a transaction lying in the personal knowledge of the latter, is admissible in evidence, where the practical inconvenience of producing on the stand the numerous persons concerned would, in the particular case, outweigh the probable utility of so doing.

BROKERS.

1. COMMISSIONS. *When not earned.*

Where the contract between the broker and his principal specifies the terms on which land is to be sold, the broker performs his duty and is entitled to his commissions when he produces a purchaser ready, willing, and able to buy on the specified terms; but where the terms are not specified, and the actual sale is to be made by the principal, the duty is not performed until he produces a purchaser to whom the principal sells. *Johnson v. Sutton*, 544.

2. SAME. *Case.*

Where a broker, employed to procure a purchaser of timber land, up to fifty thousand acres, for a specified commission, payable out of the purchase money, secured a purchaser willing to purchase forty thousand acres on condition that the portion of the tract which had not been inspected should be of a certain quality, and the purchaser refused to take the land, on the ground that a part of it was not of the standard called for, and the owner and the purchaser canceled the contract of sale, the broker was not entitled to commissions. *Ib.*

BURGLARY.

CRIMINAL LAW AND PROCEDURE. *Physical and mental infirmities of defendant. New trial. Newly discovered evidence. Intent to rape.*

Where a defendant, unable to make defense or communicate with counsel assigned to defend him because of deafness and limited

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BURGLARY—*Continued.*

intelligence, was convicted of burglary with intent to rape, he should be granted a new trial upon the discovery by counsel after the trial of evidence tending to show his innocence. *Thompson v. State*, 901.

BUSINESS SIGN.

STATUTE OF FRAUDS. *Code* 1906, § 4784. *Trader.*

Proof of one sale does not make the seller a "trader" within the meaning of Code 1906, § 4784, providing that if any person shall transact business, as a trader or otherwise, as agent of another and fail to disclose his principal by a business sign, all property used or acquired in the business shall be liable to his creditors. *Durham v. Slidell Co.*, 140.

CARRIERS.

See RAILROADS.

CHANCERY COURTS.

1. INJUNCTION. *Chancery pleading. Amendment of bill.*

In determining whether an injunction granted on an original bill shall be dissolved, an amended bill should be looked to; and it will not be dissolved where the same injunction in effect should be granted on the amended bill, which is at the same time under consideration. *Oil Mill v. Railroad Co.*, 58.

2. SAME. *Amending bill. Changing cause of action.*

An amended bill does not change the cause of action, where the foundation fact, a certain agreement for a spur track of a railroad, is the same, and the other facts are practically the same, except that the pleader draws different conclusions and makes different special prayers for relief; the object of both bills for injunction being the same, to enable another railroad than defendant to run its track into complainant's yard, the first bill drawing the conclusion that the materials in the track were complainant's property, the agreement under which the road was constructed on its land having been made without its authority, and praying that defendant be restrained from interfering with the crossing of and connection with the track by the other railroad, and the amended bill drawing the correct conclusion that the agreement was a license, which complainant had revoked, and specially praying that defendant be restrained from using the land for the track and be required to remove it. *Ib.*

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Chancery courts.

CHANCERY COURTS—*Continued.*

8. FIRE INSURANCE. *Right to relief. Delivery of policy. Bill in equity. Discovery. Demurrer.*

Actual delivery of a fire insurance policy into the hands of the insured is not essential to the validity of a contract of insurance, hence, a bill in equity against an insurance agent of several companies and one of his companies, charging that upon complainant's applying to the agent for additional fire insurance he telegraphed the application to one of his companies, believed to be the defendant company, and confirmed his telegram by letter, and that the company accepted the application, thereby completing the contract, and mailed a policy to the agent for delivery to complainant before the property was burned; that since the fire complainant had tendered the premium but the agent refused to accept it, to deliver the policy and to disclose by which of his companies it was written, discovery and appropriate relief being prayed, is not demurrable. *Niagara Ins. Co. v. Lumber Co.*, 159.

4. TAX SALES. *Infants. Redemption. Suit in chancery.*

An infant, whose land has been sold for delinquent taxes, may sue in the chancery court to redeem the same from the tax sale without waiting to become twenty-one years of age. *Day v. Lumber Co.*, 222.

5. APPEALS. *Demurrer to bill in equity. Interlocutory decree overruling.*

An appeal from a decree overruling a demurrer to a bill in equity is not a matter of right; its allowance is discretionary and should not be granted where it can only serve to delay the cause. *Ib.*

6. JUDICIAL SALES. *Confirmation. Chancellor's power. Vacation.*

A chancellor is without power in vacation to confirm a judicial sale to which objection is made because of the inadequacy of the price bid for the property. *George v. Wood*, 268.

7. SAME. *Code* 1906, § 657.

The qualifying words, "where there is no contest," in Code 1906, § 657, authorizing the chancellor in vacation to confirm sales and partitions in kind, are applicable to reports of sales as well as to partitions. *Ib.*

8. SAME. *Inadequacy of price. Resale.*

Gross inadequacy of price warrants a refusal to confirm a judicial sale and an order directing a resale of the property. *Ib.*

9. SAME. *Reversal of decree after sale but before confirmation. Partition. Excessive charge on share.*

Where, upon a nonsuspensive appeal, a partition decree charging the share of one of the cotenants with excessive rents and order-

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Chancery courts.

CHANCERY COURTS—*Continued.*

ing it sold therefor was reversed by the supreme court because of the excess, confirmation of sale made thereunder, before the reversal, should thereafter be denied the purchaser and a resale for the smaller sum found due be ordered. *George v. Wood*, 268.

10. STATUTORY CONSTRUCTION. *Amended statute.*

An amended statute must be construed according to its plain and obvious meaning, viewed in its entirety. *Ib.*

11. STALE CASE. *Decree dismissing. Should not adjudge merits.*

A decree dismissing a suit as being stale and for want of prosecution should not embody an adjudication confirming defendant's claim of title to the land in suit. *May v. Hubbard*, 456.

12. PUBLIC SCHOOLS. *Equity. Injunction. Invalid school rule.*

Equity has jurisdiction to enjoin the trustees and teachers of a public school from enforcing an invalid rule. *Hobbs v. Germany*, 469.

13. EQUITY. *Jurisdiction. Multiplicity of suits. Defenses. Legal questions. Facts.*

A bill in equity does not lie to prevent a multiplicity of suits unless the same legal questions and practically the same facts are involved in the suits the separate prosecutions of which are sought to be restrained; and the complainant must have a good, legal or equitable, defense to them. *Railroad Co. v. Barnes*, 484.

14. RECEIVERS. *Appointment. Pending cause. Judicial record. Contradiction by parol. Evidence. Chancery practice.*

While a receiver can be appointed only in a pending suit, it is not permissible in the absence of fraud to contradict the record of his appointment by testimony showing that it was made before the suit was begun. *Bank v. Hardy*, 587.

15. SAME. *Attaching creditors. Priority.*

Where an attaching creditor, after judgment in his favor, moved the chancery court for an order directing its receiver, having custody of the attached and other property of the defendant, to pay his debt or release the property attached, it was not error to deny his motion, in the absence of all evidence touching liens thereon in favor of other creditors, although the attachment was levied before the receiver was appointed. *Adams v. Bank*, 595.

16. DIVORCE. *Alimony. Enforcement of decree. Contempt proceedings. Imprisonment for debt.*

Where, in a divorce suit joined with a proceeding in the nature of an attachment in chancery for alimony, the complainant wife ob-

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Chancery courts.

CHANCERY COURTS—*Continued.*

taned a decree against the defendant husband for alimony *pendente lite* and suit money which ordered the husband's codefendants to pay into court the sums admitted by them to be due the husband, the codefendants, debtors of the husband, cannot be adjudged in contempt of court for failure to make payment as directed. *Carper v. Carper*, 598.

17. SUPREME COURT PRACTICE. *Chancery court finding of fact. Absence of testimony.*

The supreme court will not reverse the finding of a fact by the chancery court, where a witness was examined orally in that court and his testimony is not made of record and is not certified to the supreme court. *Wilson v. Brown*, 608.

18. CHANCERY PRACTICE. *Injunction. Bond. Code* 1906, § 610.

A bond, as required by Code 1906, § 610, is essential to the issuance of an injunction and one issued without it is void. *Castleman v. State*, 609.

19. SAME. *Same. Restraining order.*

Where, upon an application for injunction, a citation is issued requiring defendants to show cause why the injunction should not issue, the court cannot also issue a restraining order pending the hearing, as the order to show cause implies that defendant should not be restrained until after hearing. *Ib.*

20. SAME.

A restraining order, upon issuing citation to show cause why an injunction should not be granted, is foreign to the practice in this state. *Ib.*

21. SAME. *Violating injunction. Contempt.*

Where defendants were only charged with contempt for violating a restraining order, and the issues were made upon the violation of that order, they can only be tried on the charge as made; and he fact that the restraining order was issued on a bill amendatory of another bill on which a valid injunction had been granted was immaterial, as the order and bills must be considered separately. *Ib.*

22. SAME.

A restraining order being void, defendant could not be adjudged guilty of contempt for violating it. *Ib.*

23. JUDICIAL SALES. *Administrators. Decree for sale of land. Recitals. Service of process. Evidence. Absence of court files.*

In the absence of the court files, a decree authorizing an administrator to sell the lands of his intestate for the payment of debts,

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Chancery courts.

CHANCERY COURTS—*Continued.*

reciting that the defendants were duly served with process before its rendition, should not be overthrown by denials that they were so served where the testimony is not clear, overwhelming and convincing. *Ladd v. Craig*, 659.

24. SAME. *Same. Collateral attack. Inadequacy of price.*

On a collateral attack an administrator's sale of lands will not be held void for inadequacy of price, where the sale was made in unsettled and troubled times and the land was subject to a life estate which postponed the purchaser's occupancy for many years. *Ib.*

25. SAME. *Same. Confirmation. Evidence. Payment of bid. Sufficient proof.*

A decree confirming an administrator's sale of land, adjudging that it was made in conformity with the decree of sale, together with a recital in the deed to the purchaser that the purchase money had been paid and a charge therewith against the administrator in his accounts, sufficiently prove the payment, in a collateral attack on the sale predicated of its alleged nonpayment. *Ib.*

26. SAME. *Same. Place of sale. Code* 1871, § 1038. *County seat. Confirmation. Effect.*

By confirmation the court makes an administrator's sale its own; Code 1871, § 1038, providing that where no direction is given as to the place of sale an administrator's sale it shall be made at the county seat, does not apply to a decree empowering an administrator to make sale at a place to be determined by him, since the decree gave direction as to the place; and a sale made thereunder, confirmed by the court, is not subject to objection because not made at the county seat. *Ib.*

27. COUNTY SEAT. *Evidence. Judicial notice.*

Courts take judicial notice of the present location of the county seat of a county and where it has been located in the past. *Ib.*

28. DEEDS. *Cancellation. Reformation. Mistake. Equity jurisprudence.*

A material mistake by one or both parties to a deed as to the identity, situation, boundaries, title, amount or value of the land conveyed by it will warrant appropriate equitable relief, although its terms accord with the intent of the parties. *Allen v. Luckett*, 868.

29. SAME. *One party relying on the representations of the other. Actual fraud not essential.*

Where the purchaser was more familiar than the seller with the boundaries of the land and the grantor, relying on the represen-

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CHANCERY COURTS—*Continued.*

tation of the grantee, executed a deed, believing that it conveyed a small when it conveyed a large acreage, a court of equity will cancel the deed, although actual fraud was not proved. *Allen v. Luckett*, 868.

CHARACTER.

CRIMINAL LAW AND PROCEDURE. *Improper argument. Character. Evidence. Failure to offer.*

It is improper in a criminal case for a prosecuting lawyer to comment in his argument to the jury upon defendant's failure to offer evidence of her previous character; and, proper objection being ineffectually made thereto, it is reversible error unless defendant's guilt be overwhelmingly shown. *Turner v. State*, 458.

CLAIMANT'S ISSUE.

SALES OF PERSONALTY. *Lien for purchase money. Code* 1906, §§ 3079, 3080. *Proceedings to enforce.*

Under Code 1906, §§ 3079, 3080, giving the seller of personalty a lien thereon for the unpaid purchase price while the property remains in the hands of the first purchaser, and providing that in proceedings to enforce the lien the property shall be dealt with as in an attachment for debt, a third party may in such a proceeding propound a claim to the property and the same should be tried as if the case were an attachment suit. *Quillan v. Paine*, 696.

CLOUDS ON TITLE.

WILLS. *Joint testaments. Revocation. Trusts. Covenant to stand seized. Husband and wife. Suits to remove.*

Where a husband and wife, by a writing stipulated to be operative both as a conveyance and as a will, agreed that on the death of either all of their property, owned at the date of the writing or thereafter acquired, should belong to the other for life, and, at the death of the survivor, should be divided, by commissioners to be appointed for that purpose, one-half to be allotted to their respective designated kindred:—

(*a*) Construing the instrument as a covenant to stand seized, the wife could not after the death of the husband, in the absence of fraud or mistake, maintain a suit to cancel it as a cloud on title and have the property, real or personal, vested in her; nor

(*b*) Construing the writing as a mutual or joint will, can she revoke it as to the interest disposed of by the deceased husband. *Robertson v. Robertson*, 645.

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CODES.

Code of 1871.

§ 1038. Administrator's sale. Place of sale. Confirmation. *Ladd v. Craig*, 659.

§ 1101. Wills. Probate. Devise to subscribe witness. *Swanzy v. Kolb*, 10.

§ 2388. Wills. Probate. Credible witness. *Swanzy v. Kolb*, 10.

Code of 1880.

§ 1262. Wills. Probate. Credible witness. *Swanzy v. Kolb*, 10.

§ 1973. Wills. Probate. Devise to subscribing witness. *Swanzy v. Kolb*, 10.

Code of 1892.

§ 967. Criminal law. Assault. Intent to ravish. *Barton v. State*, 375.

§ 1801. Suit on bond. Evidence. Verified account. *Adams v. Insurance Co.*, 433.

§ 1826. Wills. Probate. Devise to subscribing witness. *Swanzy v. Kolb*, 10.

§ 1932. Estates of decedents. Probate of claims. *Saunders v. Stephenson*, 676.

§ 1983. Homestead. Conveyance. Joinder of wife. *Howell v. Hill*, 566.

§ 2294. Husband and wife. Conveyances between. *Groce v. Insurance Co.*, 201.

§ 2444. Vendor's lien. Subsequent grantee of vendor. *Howell v. Hill*, 566.

§ 3433. Process. Foreign corporation. Soliciting agent. *Saxony Mills v. Wagner*, 233.

§ 4299. Bill of lading. Effect as evidence. *Railroad Co. v. Bent*, 681.

§ 4488. Wills. Probate. Credible witness. *Swanzy v. Kolb*, 10.

Code of 1906.

§ 83. Appeals. Justice's court. Time for giving bond. *Typewriter Co. v. Taylor*, 584.

§ 86. Appeals. Supreme court. Suit begun in justice's court. Jurisdictional amount. *Switzer v. Benny*, 209.

§ 268 *et seq.* Bastardy. Suit against father. Plaintiff's marriage to another. *Welch v. Cliburne*, 443.

§ 610. Injunction. Bond. *Castelman v. State*, 609.

§ 667. Chancery sales. Confirmation in vacation. *George v. Wood*, 268.

§§ 687, 728. Justice of the peace. Summons suspended. Commencement of action. *Stewart v. Petitt*, 769.

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Code of 1906.

CODE OF 1906—*Continued.*

§ 909. Corporations. Stockholders. Torts. Non-liability. *Avery v. McClure*, 172.

§§ 923, 924. Corporations. Infringement of patent. Non-liability of directors. *Avery v. McClure*, 172.

§ 1043. Criminal law. Assault. Intent to ravish. *Barton v. State*, 375.

§ 1045. Criminal law. Firearms. Pointing same. *Coleman v. State*, 860.

§ 1122. Criminal law. Illegal voting. Municipal election. *Sample v. Verona*, 264.

§ 1359. Criminal law. Assault. Intent to ravish. Law prospective. *Barton v. State*, 375.

§ 1359. Criminal law. Assault. Intent to chaste character of woman. *Frost v. State*, 104.

§ 1508. Criminal law. Indictment. Amendment. *Thurmond v. State*, 1.

§ 1659. Homestead. Widow's right to occupy. Other heirs. *Dickerson v. Leslie*, 627.

§ 1978. Open account. Affidavit. Basis of suit on bond. *Adams v. Insurance Co.*, 433.

§ 1978. Open account. Affidavit. Conflict. Effect of affidavit. *Bryant v. Lumber Co.*, 454.

§ 2001. Wills. Probate. Devise to subscribing witness. *Swanzy v. Kolb*, 10.

§ 2106. Estates of decedents. Probate of claims. *Saunders v. Stephenson*, 676.

§ 2146. Homestead. Value. Widow's right to occupy. *Dickerson v. Leslie*, 627.

§ 2158. Homestead. Disposal of same. *Bennett v. Dempsey*, 406.

§ 2159. Homestead. Conveyance. Joinder of wife. *Jarvis v. Armstrong*, 145; *Howell v. Hill*, 566.

§ 2200. Costs. Witness fees. *Hubbard v. Hemphill*, 388.

§ 2346. Garnishment. Exemption. Suggestion. Wages. *Railroad Co. v. Badley*, 437.

§ 2522. Husband and wife. Conveyances between. Record. *Groce v. Insurance Co.*, 201.

§ 2774. Vendor's lien. Subsequent grantee of vendor. *Howell v. Hill*, 566.

§ 3074. Building contracts. Liens. Notice. *Vicksburg Mfg., etc., Co. v. Construction Co.*, 282.

§ 3074. Building contracts. Liens. Notice. Assignment. *Spengler v. Lumber Co.*, 780.

§§ 3079, 3080. Sales. Personalty. Lien. *Quillan v. Paine*, 696.

§ 3337. Municipalities. Railroad right of way. Condemnation for new street. *Railroad Co. v. State*, 759.

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§ 3340. Municipalities. Unreasonable ordinance. Skating rink. *Johnson v. Philadelphia*, 34.

§ 3422. Taxation. Assessment. Change. *Biloxi v. Real Estate Co.*, 653.

§§ 3561–3566. Party walls. Executed license distinguishable. *Binder v. Weinberg*, 817.

§ 3801. Privilege taxes. Oil mill. Property in business. *Crenshaw Oil Mill v. Johnson*, 773.

§ 3893. Privilege taxes. Prohibited business. Effect of paying of tax. *Corinth v. Crittenden*, 41.

§ 4338. Tax titles. Filing of deeds. Actual indorsement. *Brannon v. Pringle*, 215.

§ 4400. Municipalities. Highways. Law inapplicable to streets. *Railroad Co. v. State*, 759.

§§ 4487–4503. Schools. Controversies. Regulations. *Hobbs v. Germany*, 469.

§ 4525. Schools. Trustees. Authority over pupils. *Hobbs v. Germany*, 467.

§ 4623. Schools. Teachers. Authority over pupils. *Hobbs v. Germany*, 467.

§§ 4695–4716. Counties. School land. Suit for waste. *Jefferson Davis County v. Lumber Co.*, 530; *Jefferson Davis County v. Long*, 538.

§ 4775(c). Statute of frauds. Land. Option. Sufficiency. *Scherck v. Moyse*, 259.

§ 4779. Statute of frauds. Chattels. Parol sale. Delivery. *Moreland v. Cotton Co.*, 572.

§ 4784. Statute of frauds. Trader. Business sign. One sale. *Durham v. Slidell Co.*, 140.

§ 4849. Railroad Commission powers. Passenger trains. Stopping places. *Gulf, etc., R. Co. v. Commission*, 124.

§ 4851. Bills of lading. Effect as evidence. *Railroad Co. v. Bent*, 681.

§ 4854. Railroad Commission. Powers. Passenger trains. Stopping places. *Gulf, etc., R. Co. v. Commission*, 124.

§ 4896. Railroads. Interlocking device. Duty to maintain. *Railroad Co. v. Barnes*, 484.

§ 4926. Appeals. Supreme court. Damages. Value of land. *Allen v. Luckett*, 868.

§ 5078. Wills. Probate. Credible witness. *Swanzy v. Kolb*, 10.

§ 5089. Wills. Renunciation. Widow. *Jones v. Jones*, 460.

Louisiana Civil Code.

Art. 3217. Plantation supplies. Lien. Mortgages. Priority. *Lowenberg v. Lewis-Herman Co.*, 916.

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CONFESSIONS.

CRIMINAL LAW AND PROCEDURE. *Evidence. Confessions. Second Confession. Presumption.*

A confession extorted by threats is not admissible in evidence, nor is a subsequent one unless the influence of the threats be shown to have been wholly removed. *Reason v. State*, 290.

CONSTITUTION OF 1890.

§ 14. Due process of law. Bill of lading. Effect as evidence. *Railroad Co. v. Bent*, 681.

§ 17. Eminent domain. Municipality. Railroad right of way. Compensation. *Railroad Co. v. State*, 759.

§ 147. Circuit and Chancery Courts. Removal of causes. Supreme Court. Jurisdiction. *Woodville v. Jenks*, 210.

§ 193. Railroad employes. Fellow-servant rule. Hand-car. *Givens v. Railroad Co.*, 830.

CONSTITUTION OF UNITED STATES.

Amendment XIV. Due process of law. Bill of lading. Effect as evidence. *Railroad Co. v. Bent*, 681.

Amendment XIV. Equal protection of the laws. Railroad employes. Fellow-servant rule. Hand-car. *Givens v. Railroad Co.*, 830.

CONSTITUTIONAL LAW.

1. POOL AND BILLARD ROOMS. *Police power of state.*

Pool and billiard rooms are within the police power of the state and may be regulated or prohibited at legislative will. *Crittenden v. Booneville*, 92 Miss., 277, 45 South., 723, explained. *Corinth v. Crittenden*, 41.

2. SUPREME COURT. *Constitution* 1890, *sec.* 147. *Reversals forbidden in certain cases. Removal of causes from chancery to circuit courts.*

Under Constitution of 1890, sec. 147, providing that the supreme court shall not reverse a decree of the chancery court or judgment of the circuit court on the ground of a want of jurisdiction to render the judgment or decree from any error or mistake as to whether the cause in which it was rendered was of equity or common-law jurisdiction, the supreme court, there being no other error, can only affirm the decree or judgment appealed from, and, in the absence of all action on the subject by the court in which the suit was begun, cannot order the removal of a cause from the one court to the other. *Woodville v. Jenks*, 210.

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Constitutional law.

CONSTITUTIONAL LAW—*Continued.*

3. DUE PROCESS OF LAW. *Constitution* 1890, *sec.* 14. *Amendment* XIV, *constitution of U. S. Code* 1892, § 4299. *Code* 1906, § 4851. *Interstate commerce.*

Code 1892, § 4851, Code 1906, § 4851, providing that every bill of lading acknowledging the receipt of property for transportation shall be conclusive evidence in the hands of a *bona fide* holder, as against the carrier, that the property had been so received:—

(*a*) Makes certain acts voluntarily done by a carrier conclusive, creates a substantive rule of law, and is not invalid as depriving the carrier of property without due process of law; and

(*b*) It is not invalid as a regulation of interstate commerce when applied to interstate shipments; and

(*c*) A bill of lading issued by a common carrier describing a shipment of cotton linters as containing a designated number of pounds is conclusive on the carrier as to the weight, in the hands of a *bona fide* holder, although the same contain, printed above the column for the insertion of weights, the words, "Weights subject to correction." *Railroad Co. v. Bent*, 681.

4. EMINENT DOMAIN. *Constitution* 1890, *sec.* 17. *Property. Value. Railroad right of way. Street crossing.*

Under constitution 1890, § 17, providing that private property shall not be taken or damaged for public use, except on due compensation first made:

(*a*) Every species of property of value, and every right or interest in property is included; and

(*b*) The term, value, as applied to property, is the price deemed or accepted as equivalent to the utility of the thing; and

(*c*) The law infers value from the term, property, and where no value is shown nominal value will be inferred; and

(*d*) A municipality cannot take the right of way of a railroad company, or a part thereof, for a street crossing, except by eminent domain proceedings and due compensation. *Illinois, etc., R. Co. v. State*, 759.

5. RAILROADS. *Constitution* 1890, *sec.* 193. *Master and servant. Fellow-servants. Negligence. Constitution of United States. Am.* XIV. *Laws* 1908, *ch.* 194, *p.* 204.

Constitution 1890, sec. 193, providing that every employe of any railroad corporation shall have the same rights and remedies for injury from the act or omission of the corporation or its employes allowed by law to persons not employes where it results from the negligenc of a superior agent or officer, or a person having the right to control or direct the services of the party injured, and when the injury results from the negligence of a fel-

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CONSTITUTIONAL LAW—*Continued.*

low servant in another department of labor from that of the party injured or of a fellow servant on another train of cars, or one engaged about a different piece of work:

(*a*) Only applies to commercial railroads, railroads proper, carrying freight and passengers; since

(*b*) The classification of such railroads is predicated of the inherent danger attending their operation, and if construed to embrace others the section would violate the fourteenth amendment to the constitution of the United States, securing an equal protection of the laws to all litigants; and

(*c*) The employes of such railroad corporations proper can only recover of them when injured by reason of the perils attending their operation; and

(*d*) Hand cars are not more inherently dangerous than other modes of transportation not in any way connected with railroads proper and not used on the tracks of such railroads, and are not within the section; and

(*e*) Laws 1908, ch. 194, p. 204, purporting to extend the protection of the section to a new class of employes, is prospective and furnishes no relief to an employe injured before its adoption. *Givens v. Railroad Co.*, 830.

CONSTRUCTION.

See CONTRACTS, DEEDS, WILLS, CONSTITUTIONAL LAW, CODES AND LAWS.

CONTEMPT PROCEEDINGS.

1. DIVORCE. *Alimony. Enforcement of decree. Imprisonment for debt.*

Where, in a divorce suit joined with a proceeding in the nature of an attachment in chancery for alimony, the complainant wife obtained a decree against the defendant husband for alimony *pendente lite* and suit money which ordered the husband's codefendants to pay into court the sums admitted by them to be due the husband, the codefendants, debtors of the husband, cannot be adjudged in contempt of court for failure to make payment as directed. *Carper v. Carper*, 598.

2. SAME. *Violating injunction.*

Where defendants were only charged with contempt for violating a restraining order, and the issues were made upon the violation of that order, they can only be tried on the charge as made; and the fact that the restraining order was issued on a bill amendatory of another bill on which a valid injunction had been granted was immaterial, as the order and bills must be considered separately. *Castleman v. State*, 609.

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CONTEMPT PROCEEDINGS—*Continued.*

3. SAME.

A restraining order being void, defendant could not be adjudged guilty of contempt for violating it. *Castleman v. State*, 609.

CONTINUANCE.

CRIMINAL LAW. *Continuance. Absence of defendant.*

A judgment of the circuit court in a criminal case dismissing an appeal from a justice's court, because of defendant's absence, is erroneous where she departed from the court upon the case being continued for the term, and her counsel had been unable after reasonable efforts to advise her of a subsequent order setting aside the continuance. *Long v. State*, 230.

CONTRACTS.

1. FIRE INSURANCE. *Right to relief. Delivery of policy. Bill in equity. Discovery. Demurrer.*

Actual delivery of a fire insurance policy into the hands of the insured is not essential to the validity of a contract of insurance, hence, a bill in equity against an insurance agent of several companies and one of his companies, charging that upon complainant's applying to the agent for additional fire insurance he telegrahed the application to one of his companies, believed to be the defendant company, and confirmed his telegram by letter, and that the company accepted the application, thereby completing the contract, and mailed a policy to the agent for delivery to complainant before the property was burned; that since the fire complainant had tendered the premium but the agent refused to accept it, to deliver the policy and to disclose by which of his companies it was written, discovery and appropriate relief being prayed, is not demurrable. *Niagara Ins. Co. v. Lumber Co.*, 159.

2. EVIDENCE. *Written contracts. Parol to show consideration.*

The real consideration for a promissory note and deed of trust securing it, as distinguished from the expressed consideration, may be shown by parol in a suit between the parties to enjoin a foreclosure sale in pais under the deed. *Campbell v. Davis*, 164.

3. PAYMENTS. *Sunday.*

The court will not deny a debtor credit for a payment, accepted and retained by the creditor, because made on Sunday. *Ib.*

4. EVIDENCE. *Articles of copartnership. Parol to vary.*

A written contract for a partnership in the business of "overhauling machinery" cannot be altered by parol evidence showing that

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CONTRACTS—*Continued.*

one of the partners was to teach the other a trade. *Gross v. Todd*, 168.

5. CONDITIONAL SALES. *Implied obligation. Remedy of seller against third persons. Rescission.*

Where a person contracted to sell a horse in consideration of the buyer's working for him for a specified term, the title to the horse to remain in the seller until paid for, the contract was an entirety, and, the buyer having abandoned his contract, the seller had the right to reclaim the horse from a third person, to whom it had been sold by the buyer; the third person having no better right to it than the buyer had. *Cleary v. Morson*, 278.

6. HIGHWAYS. *Improvement and maintenance. Contracts. Laws* 1900, *ch.* 119, *p.* 153. *Bond of contractor.*

Under Laws 1900, ch. 119, p. 153, providing for improving and maintaining the highways by contracts to be let by the board of supervisors, the contractors to execute bonds in a penalty equal to the amount of their respective bids, a contract otherwise proper is not fatally defective because it embraced all of the highways in two supervisors' districts of the county, nor because the penalty of the contractor's bond was by inadvertance a trifle less than his bid. *Quin v. Pike County*, 356.

7. BROKERS. *Commissions. When not earned.*

Where the contract between the broker and his principal specifies the terms on which land is to be sold, the broker performs his duty and is entitled to his commissions when he produces a purchaser ready, willing, and able to buy on the specified terms; but where the terms are not specified, and the actual sale is to be made by the principal, the duty is not performed until he produces a purchaser to whom the principal sells. *Johnson v. Sutton*, 544.

8. SAME. *Case.*

Where a broker, employed to procure a purchaser of timber land, up to fifty thousand acres, for a specified commission, payable out of the purchase money, secured a purchaser willing to purchase forty thousand acres on condition that the portion of the tract which had not been inspected should be of a certain quality, and the purchaser refused to take the land, on the ground that a part of it was not of the standard called for, and the owner and the purchaser canceled the contract of sale, the broker was not entitled to commissions. *Ib.*

9. CARRIERS. *Freights. Regulations.*

Contracts for the carriage of freights by common carriers are sub-

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Contracts.

CONTRACTS—*Continued.*

ject to regulations under the law; and when a lawful regulation has been imposed the carrier cannot evade it by any printed form of contract required to be signed by the shipper. *Railroad Co. v. Bent*, 681.

10. SAME. *Same. Construction.*

Stipulations in contracts for carriage, inserted entirely for the benefit of the carrier, will be strictly construed. *Ib.*

11. SAME. *Same. Constitutional law. Due process of law. Constitution* 1890, *sec.* 14. *Amendment* XIV, *constitution of U. S. Code* 1892, § 4299. *Code* 1906, § 4851. *Interstate commerce.*

Code 1892, § 4851, Code 1906, § 4851, providing that every bill of lading acknowledging the receipt of property for transportation shall be conclusive evidence in the hands of a *bona fide* holder, as against the carrier, that the property had been so received:

(*a*) Makes certain acts voluntarily done by a carrier conclusive, creates a substantive rule of law, and is not invalid as depriving the carrier of property without due process of law; and

(*b*) It is not invalid as a regulation of interstate commerce when applied to interstate shipments; and

(*c*) A bill of lading issued by a common carrier describing a shipment of cotton linters as containing a designated number of pounds is conclusive on the carrier as to the weight, in the hands of a *bona fide* holder, although the same contain, printed above the column for the insertion of weights, the words, "Weights subject to correction." *Ib.*

12. BONDS. *Railroad. Construction.*

Bonds and mortgages securing them, written in unambiguous terms, are to be construed like other writings and their meaning cannot be varied by precedent agreements between the parties. *Railroad Co. v. Martin*, 700.

13 SAME. *Income bonds. Priority.*

Railroad income bonds, issued without coupons attached, drawing such interest, not exceeding six per centum per annum, as the road's earnings might pay after satisfying operating expenses, interest on "such other bonds as shall from time to time be outstanding and such amounts as may be prescribed to be paid to or towards sinking funds for the redemption thereof," are subordinate to all outstanding bonds of the company and not merely to the first mortgage bonds, although a previous suit by the holders of the income bonds seeking to have them adjudged superior to all other bonds except those secured by the first mortgage was compromised by additionally securing the income bonds

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Contracts.

CONTRACTS—*Continued.*

(without changing their terms), and indorsing that fact upon them. *Railroad Co. v. Martin*, 700.

14. CONSTRUCTION.

In construing a contract all of its provisions must be considered.

15. SAME. *Contemporaneous construction by parties.*

The contemporaneous construction, placed on an instrument of writing by the parties, is entitled to much weight in determining its intent and purpose. *Spengler v. Lumber Co.*, 780.

16. SAME. *Assignment. Building agreement.*

A person who contracts to erect a building for another has the right to assign the money due or to become due to him from the owner on the contract. *Ib.*

17. SAME. *Same. Assent of debtor. Necessity.*

The assent of the owner to an assignment by a building contractor of the money due and to become due on the contract is not essential to the validity of the assignment. *Ib.*

18. MECHANIC'S AND MATERIALMAN'S LIEN. *Assignee of contractor. Subcontractors. Materialmen. Laborers. Code* 1906, § 3074. *Priority of liens.*

Under Code 1906, § 3074, giving to subcontractors, materialmen and laborers a lien on the amount due by the owner to the contractor upon their giving notice to the owner, an assignee of the principal contractor has the prior right to the fund as against subcontractors, materialmen and laborers serving notice after the assignment. *Ib.*

19. SAME. *Assignment of principal contract. Effect.*

Where a building contractor transferred to a third person the balance due under the contract to secure advancements to aid in the construction of the building, and thereafter the owner paid the sums due on the contract to the assignee, the transfer was an assignment of the funds due and to become due under the contract, but not of the contract itself, and the assignee occupies no relation towards persons furnishing material and labor in the construction or completion of the building. *Ib.*

20. SAME. *Same.*

That the assignee of a building contractor, to whom the balance due and to become due from the owner had been transferred, consented to materialmen and laborers furnishing material and labor in the construction of the building did not affect his rights under the assignment. *Ib.*

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Contracts.

CONTRACTS—*Continued.*

21. SAME. *Same.*

The right of a subcontractor, materialman or laborer, under Code 1906, § 3074, to a lien on the amount due from the owner to the principal contractor on giving notice to the owner as provided in the statute, is defeated by a *bona fide* assignment by the contractor of the balance due and to become due under the contract, made before the service of such notice, although the assignee did not give them notice of the assignment. *Spengler v. Lumber Co.*, 780.

An assignment by a building contractor of the balance due and to become due under the contract for a debt due to the assignee from the assignor, not growing out of the construction of the building, is good as against subcontractors, materialmen and laborers subsequently serving notice on the owner. *Ib.*

22. CONSTRUCTION.

A construction making a contract fair and reasonable is to be preferred to one making it unfair and unreasonable. *Buster Brown Co. v. Dry Goods Co.*, 856.

24. SAME. *Exclusive rights.*

A contract by which plaintiff was to furnish defendant its "advertising service" consisting of one "cut" per week, for which defendant was to pay three dollars a week, have the exclusive right to use the same in the city of his residence, and hold the "cuts" subject to plaintiff's order when the contract expired, did not preclude plaintiff from furnishing "cuts" to other parties in said city. *Ib.*

25. RAILROADS. *Road bed. Maintenance. Overflow of land. Adjustment of past damages. Altered construction. Release of future damages.*

Where in the adjustment of a claim for past damages caused by overflows of land, a railroad company makes alterations in its road bed, and, in consideration thereof, the owner released it from future damages caused by the operation of the road as altered, and the alteration consisted partly in the cutting of a ditch on its right of way and the company kept the ditch opened for several years after the adjustment, the release does not operate to relieve the railroad company from damages resulting from a failure to keep the ditch opened. *Lackey v. Railroad Co.*, 893.

26. STATUTE OF FRAUDS. *Code* 1906, § 4775 (*d*). *Agreement not to be performed within one year. Contract of employment to begin in future. Memorandum. Several writings. Case.*

Under the statute of frauds, Code 1906, § 4775 (*d*), providing that

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CONTRACTS—*Continued.*

an action shall not be brought whereby to charge a defendant or other party upon any agreement which is not to be performed within the space of one year from the making thereof, unless the promise or agreement, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some person by him or her thereunto lawfully authorized:

(*a*) A verbal contract of employment to begin in the future and continue for one year thereafter is within the statute; and

(*b*) A memorandum of a contract, to make it enforceable, must include all the material matters of the agreement, so that resort to parol testimony will be unnecessary, except to show the situation of the parties and the application of the terms used in the writing to the subject-matter; and

(*c*) The memorandum must be signed as provided in the statute; and

(*d*) While the memorandum may consist of several distinct writings, and all of them need not be signed by the party to be charged, they must so relate that the one signed by the party to be charged can be held to be an approval of the unsigned ones in order to bind him to the terms of the contract set forth in them; and

(*e*) The statement in a letter from defendant, responding to one from the plaintiff detailing the terms of the unenforceable verbal contract of employment, in these words, "As for the talk I had with you when you applied for the situation, I excepted much from you; that is why I offered you a large salary," was not a consent to the terms of the contract as detailed in plaintiff's letter, and the two writings did not take the case out of the statute.

(*f*) The statute does not require that the writing shall be executed at any special time before it is offered in evidence. *Fertilizer, etc., Co. v. Reneau*, 904.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

CORPORATIONS.

1. FRANCHIES. *Municipalities. Waterworks. Taxation. Mode of assessment.*

The grant by a city of the exclusive privilege of constructing and operating a waterworks plant therein, and to use the streets for the purpose:

(*a*) Is a franchise;

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Corporations.

CORPORATIONS—*Continued.*

(*b*) Is property;

(*c*) Is taxable as personalty; and

(*d*) Is not embraced in an assessement of "capital invested in merchandise and manufacturing. *Adams v. Bullock*, 27

2. DEEDS. *Adoption of officer's act. Estoppel.*

A written agreement giving a license to a railroad company to locate and use a spur track over the land of a corporation, though signed by its president in his individual name, is the contract of the corporation if it knew of the long use of the track for its benefit and acquiesced therein, and it is estopped to claim that it did not execute the agreement. *Oil Co. v. Railroad Co.*, 58.

3. DEBTS. *Stockholders. Directors. Personal liability. Code* 1906, §§ 909, 923, 924. *Patent. Infringement of. Torts.*

The infringement of a patent is a tort, and a judgment against a corporation for damages resulting therefrom is not a debt within the meaning of:

(*a*) Code 1906, § 909, providing that every stockholder of a corporation shall be individually liable for its debts contracted during his ownership of the stock to the extent of any unpaid balance on his subscription therefor, the liability to continue for one year after his transfer of the stock, and that any creditor of the company may sue therefor; nor within

(*b*) Code 1906, § 923, providing that the directors of an insolvent corporation assenting to a diversion of its capital stock or the payment of a dividend, and the stockholder receiving a dividend, shall be jointly liable to the existing creditors of the corporation to the extent of the withdrawal or payment with interest; nor within

(*c*) Code 1906, § 924, limiting the amount of debts which a trading corporation should contract and making the directors who contracted debts in excess thereof personally liable therefor. *Avery v. McClure*, 172.

4. FOREIGN. *Process. Code* 1892, § 3433, *Laws* 1894, *ch.* 61, *p.* 49. *Doing business in state.*

A foreign trading corporation having no office or place of business in this state but employing a soliciting agent to obtain orders and send them to the home office, where they are filled by shipments direct to the purchasers, is not doing business in this state, within the meaning of Code 1892, § 3433, amended Laws 1894, ch. 61, p. 49, providing for the service of process on corporations; nor is its soliciting agent "an agent" upon whom process against it can be served. *Saxony Mills v. Wagner*, 233.

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Corporations—Criminal law and procedure.

CORPORATIONS—*Continued.*

5. TAXATION. *Assessment. Description of property. "Capital invested in merchandise and manufacturing."*

An assessment for taxation of a waterworks company for "capital invested in merchandise and manufacturing" includes its pipes, hydrants, etc., but not its solvent credits. *Adams v. Waterworks Co.*, 601.

COSTS.

WITNESS FEES. *Code* 1906, § 2200.

A litigant who has been adjudged entitled to recover costs, cannot compel his adversary to pay witness fees, unless the statute, Code 1906, § 2200, regulating the subject has been observed. *Hubbard v. Hemphill*, 388.

COUNTIES.

DELEGATED POWER.

Counties are mere political subdivisions of the state, created to act for the state in local matters, and the rule forbidding the delegation of a delegated power does not prevent the state from acting through them in dealing with sixteenth-sections school lands. *Jefferson Davis County v. Lumber Co.*, 530.

CRIMINAL LAW AND PROCEDURE.

1. MURDER. *Indictment. Amendment. Change of name of deceased. Designation by number. Code* 1906, § 1508.

Where on the trial of a murder case the witnesses were uncertain as to the name of the decedent as charged in the indictment, but knew him definitely as "Twelve," referring to his number as a convict, an amendment of the indictment so as to make it charge the murder of one "Twelve," a human being, etc., was permissible, under Code 1906, § 1508, authorizing the amendment of indictments. *Thurmond v. State*, 1.

2. HOMICIDE. *Murder. Evidence. Dying declaration. Sense of impending dissolution.*

The declarations of a dying man are sufficiently shown to have been made under a sense of impending dissolution to make them admissible in evidence, if otherwise competent, if it be shown that the deceased had been informed by his attending physician that there was no hope for his recovery and that he announced, when he made the declarations, that he was going to die, that he could not live and that his stomach was killing him. *Jackson v. State*, 83.

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Criminal law and procedure.

CRIMINAL LAW AND PROCEDURE—*Continued.*

3. SAME. *Same. Killed for nothing.*

A dying declaration is admissible in evidence, where otherwise competent, although it be merely the statement by the declarant that accused killed him for nothing. *Jackson v. State*, 83.

4. SAME. *Prosecuting lawyer. Improper argument. Harmless error.*

A statement by the prosecuting lawyer, in argument to the jury, to the effect that more murders had been committed in the county than elsewhere in the state, and that it was high time for the juries to put a stop to them, does not constitute reversible error where upon objection the court advised the jury that it was improper and should be disregarded. *Ib.*

5. SALE OF INTOXICANTS. *Objections to testimony. Motion for new trial. Supreme court practice.*

Exceptions to rulings on testimony not called to the attention of the trial court in a motion for a new trial will not be cause for reversal by the supreme court. *Borroum v. State*, 88.

6. SAME. *Same. General law. Special act.*

A conviction for the unlawful sale of intoxicating liquors can be had under a general law, although the offense was committed in a part of the county subject to a previous local law prohibiting such sales and penalties prescribed in the two statutes are different. *Ib.*

7. WITNESSES. *Husband and wife. Failure of husband to call wife. Argument.*

The failure of the husband to call his wife as a witness for him in a criminal case is not a proper subject of comment by counsel. *Johnson v. State*, 91.

8. RAPE. *Assault to rape. Evidence. Particulars. Hearsay not admissible.*

In a prosecution for an assault with intent to rape, it is competent for the state to show that the prosecutrix complained soon after the assault, but the particulars of her complaint and of the offense as narrated by her are not admissible in evidence. *Frost v. State*, 104.

9. SAME. *Code* 1906, § 1359. *Indictment. Chaste character of woman.*

In order to convict under Code 1906, § 1359, providing that any person convicted of an assault with intent to ravish a woman of previous chaste character shall be punished by imprisonment in the penitentiary for life, or for such time as may be fixed by the jury, the indictment must charge the previous chaste character of the woman. *Ib.*

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Criminal law and procedure.

CRIMINAL LAW AND PROCEDURE—*Continued.*

10. MURDER. *Evidence. Motive.*

A conviction of murder, otherwise supported by evidence, will not be reversed by the supreme court alone because the motive for the killing was not proved. *House v. State*, 107.

11. SAME. *Dying declaration. Predicate.*

A dying declaration, made after a physician had advised declarant that he could live only a few hours, and spoken, only two hours before his death, immediately following his statement that he believed he was going to die and would like to see his parents and his wife and that if he had to die he would die brave, is not subject to the objection that a proper predicate was not shown for its admission in evidence. *Ib.*

12. SAME. *Same. Competency.*

A dying declaration, which is the direct result of observation through declarant's senses, is admissible; but a declaration which comes from a course of reasoning from collateral facts is inadmissible. *Ib.*

13. SAME. *Same. Opinion. Killed without cause.*

A dying declaration that accused killed declarant without just cause is admissible as a statement of a fact, and is not objectionable as the opinion of the declarant, where the facts of the killing were known to declarant. *Ib.*

14. SEPARATION OF JURY IN MURDER CASE. *Effect.*

A conviction of murder will not be set aside because one of the jurors separated himself from his fellows during their deliberations, where it is highly improbable that he was communicated with during the separation. *Cunningham v. State*, 228.

15. INTOXICANTS. *Unlawful sale. Beverage. Ignorance no excuse.*

Where intoxicating liquors are sold as a beverage the seller cannot escape liability for an unlawful sale by showing that "the goods" were guaranteed by the wholesaler from whom he purchased to be non-intoxicating and that he made the sale honestly so believing. *Bacot v. State*, 225.

16. CONTINUANCE. *Absence of defendant.*

A judgment of the circuit court in a criminal case dismissing an appeal from a justice's court, because of defendant's absence, is erroneous where she departed from the court upon the case being continued for the term, and her counsel had been unable after reasonable efforts to advise her of a subsequent order setting aside the continuance. *Long v. State*, 230.

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Criminal law and procedure.

CRIMINAL LAW AND PROCEDURE—*Continued.*

17. ROBBERY. *Indictment.*

An indictment is fatally defective if it charge only that the defendant represented himself to be an officer and threatened to arrest and imprison the prosecutor, and did then and there take and carry away the prosecutor's personal property, of designated value, given defendant by prosecutor through fear of injury to his person. *Blackwell v. State*, 240.

18. VINOUS AND SPIRITUOUS LIQUORS. *Malt liquors. Variance.*

Under an indictment charging defendant only with having unlawfully sold vinous and spirituous liquors, he cannot be convicted of having unlawfully sold a malt liquor. *Smith v. State*, 255.

19. ILLEGAL VOTING. *Code* 1906, § 1122. *Municipal election.*

A municipal election is within Code 1906, § 1122, making illegal voting at any election an indictable offense. *Sample v. Verona*, 264.

20. EVIDENCE. *Confessions. Second confession. Presumption.*

A confession extorted by threats is not admissible in evidence, nor is a subsequent one unless the influence of the threats be shown to have been wholly removed. *Reason v. State*, 290.

21. OFFICIAL COTTON WEIGHER. *Winston County. Laws* 1906, *ch.* 227, *p.* 269. *Injunction.*

Under Laws 1906, ch. 227, p. 269, creating the office of cotton weigher for Wintson county, a person elected to the office cannot restrain a warehouseman from having cotton received in the course of his business weighed by a private person, nor can he recover damages from the warehouseman for urging others not to have cotton weighed by him. *Miller v. Warehouse Co.*, 348.

22. WITNESSES. *Credibility. Instructions. Curatives.*

An instruction for the state in a criminal case, wherein defendant testified in his own behalf, authorizing the jury in determining the weight to be given the testimony of any witness to consider his interest in the case, or want of it, and the reasonableness or unreasonableness of his testimony, is not erroneous as pointing out the accused to be disbelieved, where another testified in his behalf to nearly all of the material facts; but if erroneous, the error was cured by another instruction telling the jury that they could not arbitrarily disregard defendant's testimony because he was the defendant, but should give it the same consideration as the testimony of any other witness. *Vails v. State*, 365.

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Criminal law and procedure.

CRIMINAL LAW AND PROCEDURE—*Continued.*

23. MISDEMEANOR. *Affidavit charging. Necessity for.*

A conviction for a misdemeanor must be reversed if not predicated of an indictment or affidavit charging the commission of the crime. *Woodson v. State*, 370.

24. HOMICIDE. *Murder. Accidental killing. Manslaughter instructions.*

Where a defendant charged with murder is either manifestly guilty as charged or wholly innocent of the crime, a state's instruction authorizing a conviction of manslaughter is fatally erroneous. *Stovall v. State*, 373.

25. RAPE. *Assault to. Idnictment. Code* 1906, § 1359. *Ex post facto law. Code* 1892, § 967.

An indictment predicated of Code 1906, § 1359, a new statute making it a felony, punishable by imprisonment for life or such shorter time as the jury may fix, to assault with intent to forcibly ravish any woman of previous chaste character:

(*a*) Cannot be maintained by proof of acts committed before the statute becomes operative; nor

(*b*) Be referred to Code 1892, § 967 (re-enacted Code 1906, § 1043), in force at the time of the acts, making it a felony, punishable by imprisonment not exceeding ten years, to assault a woman with intent to ravish her. *Barton v. State*, 375.

26. SAME. *Punishment.*

A defendant convicted of a felony punishable by imprisonment in the penitentiary for life or such shorter time as the jury may fix, cannot, in the absence of a verdict fixing the imprisonment, be sentenced for a term of years fixed by the court. *Ib.*

27. HOMICIDE. *Justification. Self-defense. Apprehension of danger. "Great bodily harm."*

The rule in homicide cases that "great bodily harm," in contemplation of law, does not mean such harm as may be inflicted by mere blows with the hands or feet, is subject to the modification that where deceased was so much larger and stronger than defendant, that defendant was liable to receive great bodily injuries at his hands, he may be justified in using a deadly weapon to protect himself, although deceased was wholly unarmed. *Hill v. State*, 391.

28. EVIDENCE. *Facts calculated to discredit state witness's statements.*

Testimony caluculated to cause the jury to doubt the truth of material statements made by a witness for the state in a criminal case should not be rejected; the qustion as to whether it be purely speculative is for the jury. *Booze v. Yazoo City*, 428.

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Criminal law and procedure.

CRIMINAL LAW AND PROCEDURE—*Continued.*

29. BASTARDY. *Code* 1906, §§ 268 *et seq.* *Married woman.*

A woman cannot maintain bastardy proceedings against the father of her illegitimate child under Code 1906, §§ 268 *et seq.*, governing such actions, if she be married at the time of its birth, although deserted by her husband. *Welch v. Cliburne*, 443.

30. IMPROPER ARGUMENT. *Character. Evidence. Failure to offer.*

It is improper in a criminal case for a prosecuting lawyer to comment in his argument to the jury upon defendant's failure to offer evidence of her previous character; and, proper objection being ineffectually made thereto, it is reversible error unless defendant's guilt be overwhelmingly shown. *Turner v. State*, 458.

31. WITNESSES. *Impeachment. Contradiction. Immaterial matter.*

A witness cannot be contradicted upon an immaterial and collateral matter. *Cooper v. State*, 480.

32. MURDER. *Evidence. Photographs.*

In a murder case, pictures, not representations of the scene of the homicide, but created by the joint efforts of the state's leading witness, whose testimony is controverted, and a photographic artist, are not admissible in evidence. *Brett v. State*, 669.

33. SAME. *Instruction. Maliciously. Malice aforethought.*

The word "maliciously," used in an instruction in a murder case, does not convey the same meaning or have the same force and effect as the words "malice aforethought." *Ib.*

34. SAME. *Same. On weight of evidence.*

An instruction in a murder case is not on the weight of evidence where it simply charges that the defendant is guilty of murder if the jury believe from the evidence, beyond a reasonable doubt, that he wilfully and maliciously shot and killed the deceased with a deadly weapon, at a time when defendant was not in imminent danger and when he had no reasonable ground to apprehend such danger. *Ib.*

35. SAME. *Charges already given.*

Where every phase of defendant's case is fully covered by instructions already given at his request, it is not error to refuse further instruction asked by him. *Ib.*

36. EVIDENCE. *Burglary.*

In a prosecution for burglary, a conversation between a witness and the accused wherein the defendant was informed that he was charged with the crime and that his wife was responsible for the charge is inadmissible in evidence. *Finklea v. State*, 777.

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Criminal law and procedure.

CRIMINAL LAW AND PROCEDURE—*Continued.*

37. SAME. *Same. Ill feeling between husband and wife.*

In a criminal case evidence of ill will between the accused and his wife is inadmissible. *Finklea v. State*, 777.

38. SAME. *Witnesses. Husband and wife. State should not call defendant's wife.*

In a criminal case it is improper for the state to call the wife of the defendant as a witness, and compel him in the presence of the jury to object to her as being incompetent. *Ib.*

39. CODE 1906, § 1045. *Weapons, pointing or aiming at another. Indictment. Duplicity.*

An indictment predicated of Code 1906, § 1045, making it an offense to intentionally point *or* aim a gun, pistol, etc., at or towards another, is not double because it charges that defendant pointed *and* aimed a pistol at another. *Coleman v. State*, 860.

40. SAME. *Statutory offenses. Construction. Alternatives.*

Where a statute makes punishable the doing of one thing "or" another, the person who in one transaction does all violates the statute but once, incurring but a single penalty, so that an indictment may properly allege in a single count that defendant did as many of the forbidden things as the pleader chooses, employing the conjunction "and" where the statute uses "or," without subjecting the indictment to the charge of duplicity. *Ib.*

41. NEW TRIAL. *Newly discovered evidence. Impeaching testimony.*

A new trial will not be granted for newly discovered evidence impeaching a witness for the state. *Bailey v. State*, 863.

42. SAME. *Evidence. Self-serving. Homicide. Flight. Failing to escape having opportunity.*

Proof that while awaiting trial defendant had opportunity to escape but refrained and warned an officer of the escape of a fellow prisoner is self-serving and inadmissible, although the state has offered evidence of defendant's flight immediately after the homicide. *Ib.*

43. PUNISHMENT. *County contract for working prisoners. Misdemeanant. Failure to pay fine and costs.*

A convicted misdemeanant, failing to pay the fine and costs imposed on him, must remain in jail, if the county has made no provision for the working of convicts, and the want of such provision does not entitle him to his liberty. *Ex parte Parker*, 899.

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Criminal law and procedure—Damages.

CRIMINAL LAW AND PROCEDURE—*Continued.*

44. PHYSICAL AND MENTAL INFIRMITIES OF DEFENDANT. *New trial. Newly discovered evidence. Burglary. Intent to rape.*

Where a defendant, unable to make defense or communicate with counsel assigned to defend him because of deafness and limited intelligence, was convicted of burglary with intent to rape, he should be granted a new trial upon the discovery by counsel after the trial of evidence tending to show his innocence. *Thompson v. State*, 901.

DAMAGES.

1. WAREHOUSEMAN. *Damage to goods. Action for. Evidence.*

In an action for damages to certain lots of cotton, described in a bill of particulars, while stored in defendant's warehouse, each bale of which was evidenced by a separate compress receipt, testimony showing the damage to all the cotton, and identifying the damaged bales as the identical cotton delivered to defendant and described in the bill of particulars, and that the damage resulted through defendant's negligent handling of it, was sufficient, and it was not necessary to prove the particular damage to each separate bale. *Compress Co. v. Atkinson*, 93.

2. VERDICT NOT EXCESSIVE. *Death.*

Facts of the case considered and a verdict in plaintiff's favor, awarding twenty-two thousand five hundred dollars as damages for the wrongful death of a person, adjudged not execssive. *Railroad Co. v. Farr*, 557.

3. VERDICT EXCESSIVE. *Personal injuries.*

Facts of the case considered and a verdict in plaintiff's favor awarding twenty-five thousand dollars as damages for personal injuries adjudged excessive. *Railroad Co. v. Cobb*, 561.

4. APPEAL. *Code* 1906, § 4926. *Value of land.*

An unsucceessful appeal from a decree cancelling a deed to land and awarding possession, entitles the appellee, under Code 1906, § 4926, so providing, to recover damages, five per centum on the value of the land. *Allen v. Luckett*, 868.

5. PUNITIVE DAMAGES. *Telephone company. Denying service.*

Where a telephone company, in an effort to obey the order of a supervising state commission, abolishing free county telephone service and fixing charges, forwarded a general circular to the managers of its exchanges in the state directing a compliance with the order, and the manger of an exchange, not knowing that the franchise of the company in his city required it to ex-

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DAMAGES—*Continued.*

tend such services free to its patrons there, courteously denied plaintiff free county service, until his attention was called to the franchise when he at once communicated with his company and promptly resumed the free service, the company is not liable to plaintiff for punitive damages because of such denial. *Telephone Co. v. Paine*, 883.

6. HARMLESS ERROR. *Appeal. Instruction.*

Erroneous instructions on the measure of damages are harmless where the jury find that there is no liability. *Fairfield v. Railroad Co.*, 887.

7. RAILROADS. *Road bed. Maintenance. Overflow of land. Adjustment of past damages. Altered construction. Release of future damages.*

Where in the adjustment of a claim for past damages caused by overflows of land, a railroad company makes alterations in its road bed, and, in consideration thereof, the owner released it from future damages caused by the operation of the road as altered, and the alteration consisted partly in the cutting of a ditch on its right of way and the company kept the ditch opened for several years after the adjustment, the release does not operate to relieve the railroad company from damages resulting from a failure to keep the ditch opened. *Lackey v. Railroad Co.*, 893.

DECEIT, ACTION FOR.

1. PLEADINGS. *Declaration. Demurrer. Representations. Knowlege of falsity.*

A declaration in an action of deeceit for false representations is demurrable if it neither charges that the representations were made by defendant with knowledge of their falsity, nor pleads such facts as impute knowledge thereof to him. *Vincent v. Corbett*, 46.

2. SAME. *Evidence.*

To maintain an action of deceit for false representations it must be shown that the representations were made with actual knowledge of their falsity, or—what is the equivalent of conscious misrepresentation—that they were made recklessly and without regard to their truth or falsity. *Ib.*

3. SAME. *Scienter.*

The scienter must be charged and proved in actions of deceit; but it is sufficient to show that the false representations were made

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DECEIT, ACTION FOR—*Continued.*

as of defendant's own knowledge, when he was without knowledge, or when, because of his position, he should have known their truth or falsity. *Vincent v. Corbett*, 46.

4. SAME. *Matter of fact. Area of cleared land in tract.*

A statement by an owner of a tract of land that a designated number of acres thereof was cleared is an averment of a fact and not the expression of an opinion, and, if false, an action of deceit can be predicated of it. *Ib.*

5. SAME. *Evidence. Prima facie case.*

Proof of a false statement by defendant touching the area of cleared land in a tract he was seeking to sell, materially overstating the number of acres, and that plaintiff bought on the faith thereof, makes out a *prima facie* case against the vendor in an action of deceit by the vendee, although plaintiff gave defendant credit for an honest mistake. *Ib.*

DEEDS.

1. CORPORATIONS. *Adoption of officer's act. Estoppel.*

A written agreement giving a license to a railroad company to locate and use a spur track over the land of a corporation, though signed by its president in his individual name, is the contract of the corporation if it knew of the long use of the track for its benefit and acquiesced therein, and it is estopped to claim that it did not execute the agreement. *Oil Co. Railroad Co.*, 58.

2. HUSBAND AND WIFE. *Conveyances between. Code* 1892, § 2294, *amended Laws* 1900, *ch.* 90, *p.* 130. *Code* 1906, § 2522. *Fire insurance. Unconditional and sole ownership. Unacknowledged and unrecorded deed. Third party.*

An unacknowledged and unrecorded deed from a wife to her husband is valid as between the parties and is oprative to invest the husband with title within the meaning of the "unconditional and sole ownership" clause of a fire insurance policy, the insurer not being a "third party" within the meaning of Code 1892, § 2294, amended Laws 1900, ch. 90, p. 130 (Code 1906, § 2522), providing that a conveyance of lands between husband and wife shall not be valid as against any third person unless in writing, acknowledged and recorded. *Groce v. Insurance Co.*, 201.

3. TAXATION. *Tax deeds. Filing for redemption. Clerk need not actually indorse. Code* 1906, § 4338.

It is not essential to the validity of a tax deed that the chancery clerk should have marked it "Filed" when the collector depos-

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DEEDS—*Continued.*

ited it with him under Code 1906, § 4338, requiring the collector to file all conveyances of land sold for taxes in the chancery clerk's office, there to remain, subject to redemption, for two years from the sale *Brannon v. Pringle*, 215.

4. PARTY WALLS. *User.*

Where a deed to a strip of land off of the south side of the grantor's lot reserved a right in the grantor to use the wall which the grantee contemplated building on the north side of the strip, and required openings to be left in the wall, so that the grantor could have access through the grantee's building to the upper floors of any house that he might erect on the balance of his lot, a common wall constructed and used accordingly for many years became and was a party wall. *Lexington Lodge v. Beal*, 521.

5. VENDOR'S LIEN DEBT. *Junior grantee. Code* 1892, § 2444. *Right or estate in land.*

A purchase money debt for land, secured by a vendor's lien, does not pass to a subsequent grantee in a second warranty deed for the same land, executed by the grantor in the first one, the case not being within Code 1892, § 2444, providing that where a grantor does not own the entire estate which he purports to convey his deed shall nevertheless invest the grantee with whatever "right or estate" he may have had in the lands. *Howell v. Hill*, 566.

6. CANCELLATION. *Reformation. Mistake. Equity jurisprudence.*

A material mistake by one or both parties to a deed as to the identity, situation, boundaries, title, amount or value of the land conveyed by it will warrant appropriate equitable relief, although its terms accord with the intent of the parties. *Allen v. Luckett*, 868.

7. SAME. *One party relying on the representations of the other. Actual fraud not essential.*

Where the purchaser was more familiar than the seller with the boundaries of the land and the grantor, relying on the representation of the grantee, executed a deed, believing that it conveyed a small when it conveyed a large acreage, a court of equity will cancel the deed, although actual fraud was not proved. *Ib.*

8. CONSTRUCTION. *Husband and wife. Property conveyed.*

A deed, naming a wife only as grantor and purporting to convey her crops to be grown, does not convey cotton grown by her husband in which she had no interest, although he signed the deed and some of his personal property was conveyed thereby. *Mills-Guy Co. v. Dickerson*, 874.

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DEEDS OF TRUST.

See MORTGAGES AND DEEDS OF TRUST.

DEFAULTS.

See JUDGMENTS.

DELAYAGE AND DEMURRAGE RULES.

See RAILROAD COMMISSION.

DIVORCE.

See MARRIAGE AND DIVORCE.

DYING DECLARATIONS.

See CRIMINAL LAW AND PROCEDURE.

EASEMENTS.

PARTY WALLS. *Grant. Necessity. Code* 1906, §§ 3561-3565. *Rights of owners.*

Where under an oral agreement adjacent owners erect on their lots a two-story building with a party wall on the boundary and a common hall-way for the second story over the wall, contemplating that the hall-way should be kept open for passage and to light and ventilate the rooms on the second floor:

(*a*) The agreement did not create an easement by grant; and

(*b*) An easement of strict necessity is not implied, where, as here, an interference with the right of the complainant to have the hall-way unobstructed is remediable at a reasonable expense; and

(*c*) A deed from one of the parties to a third person conveying his lot "together with all improvements thereon, party wall agreements thereunto appertaining, and easements;" does not show an easement when none existed before; but

(*d*) The agreement, erection and use of the building constituted an executed license, and the grantee in the deed is estopped to take one-half of the hall-way and erect a permanent structure thereon, interfering with light, ventilation and passage; since

(*e*) The deed is sufficient to put the party on notice that there were party wall agreements, the full nature and extent of which he was required to ascertain; and

(*f*) The rights of the parties to have the hall-way kept free from obstruction is not within Code 1906, §§ 3561-3566, providing how walls may become party walls, regulating compensation therefor and preventing their removal or impairment in value. *Binder v. Weinberg*, 817.

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ELECTIONS.

CRIMINAL LAW AND PROCEDURE. *Illegal voting. Code* 1906, § 1122. *Municipal election.*

A municipal election is within Code 1906, § 1122, making illegal voting at any election an indictable offense. *Sample v. Verona*, 264.

EMINENT DOMAIN.

1. MUNICIPALITIES. *Laying out streets. Eminent domain. Code* 1906, §§ 3337, 4400. *Railroad track crossed.*

A municipality in laying out a new street, or extending an old one, crossing a railroad track, must, as provided in Code 1906, § 3337, adopt the procedure provided in Code 1906, ch. 43, relating to the subject of eminent domain; it cannot proceed in so doing under Code 1906, § 4400, relating to the laying out of highways by counties. *Illinois, etc., R. Co. v. State*, 759.

2. SAME. *Same. Viaduct. Bridge.*

A municipality cannot, by ordinance or otherwise, compel a railroad company to construct a viaduct over its track at a point where a street has not been legally laid out across the track. *Ib.*

3. CONSTITUTIONAL LAW. *Constitution* 1890, *sec.* 17. *Eminent domain. Property. Value. Railroad right of way. Street crossing.*

Under constitution 1890, sec. 17, providing that private property shall not be taken or damaged for public use, except on due compensation first made:

(*a*) Every species of property of value, and every right or interest in property is included; and

(*b*) The term, value, as applied to property, is the price deemed or accepted as equivalent to the utility of the thing; and

(*c*) The law infers value from the term, property, and where no value is shown nominal value will be inferred; and

(*d*) A municipality cannot take the right of way of a railroad company, or a part thereof, for a street crossing, except by eminent domain proceedings and due compensation. *Ib.*

ESTATES OF DECEDENTS.

1. WILLS. *Renunciation by widow. Code* 1906, § 5089. *Commissioners to ascertain widow's interest. Executor may petition for. Parties.*

A petition for the appointment of commissioners to ascertain the share of the widow renouncing the will of her deceased husband, under Code 1906, § 5089, governing such cases, may be brought by the executor, all parties in interest including devisees and

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Estates of decedents.

ESTATES OF DECEDENTS—*Continued.*

legatees as well as the widow being made defendants; but such a proceeding is premature if begun before it can be reasonably determined what part of the estate will be left for distribution after the payment of creditors. *Jones v. Jones*, 460.

2. HOMESTEAD. *Widow's right. Other heirs. Code* 1906, § 1659. *Partition.*

The widow is entitled, under Code 1906, § 1659, so providing, as against his other heirs, to occupy the exempt homestead of her deceased husband during her widowhood and a partition thereof in the absence of her consent will not be granted irrespective of its value. *Dickerson v. Leslie*, 627.

3. SAME. *Code* 1906, § 2146. *Value limit.*

The provisions of Code 1906, § 2146, exempting a homestead from execution, in so far as they limit its value to a sum not exceeding three thousand dollars, have no application to a controversy between the widow and the other heirs of a deceased homesteader touching her right to occupy the premises and defeat partition. *Ib.*

4. JUDICIAL SALES. *Administrators. Decree for sale of land. Recitals. Service of process. Evidence. Absence of court files.*

In the absence of the court files, a decree authorizing an administrator to sell the lands of his intestate for the payment of debts, reciting that the defendants were duly served with process before its rendition, should not be overthrown by denials that they were so served where the testimony is not clear, overwhelming and convincing. *Ladd v. Craig*, 659.

5. SAME. *Same. Collateral attack. Inadequacy of price*

On a collateral attack an administrator's sale of lands will not be held void for inadequacy of price, where the sale was made in unsettled and troubled times and the land was subject to a life estate which postponed the purchaser's occupancy for many years. *Ib.*

6. SAME. *Same. Confirmation. Evidence. Payment of bid. Sufficient proof.*

A decree confirming an administrator's sale of land, adjudging that it was made in conformity with the decree of sale, together with a recital in the deed to the purchaser that the purchase money had been paid and a charge therewith against the administrator in his accounts, sufficiently prove the payment, in a collateral attack on the sale predicated of its alleged nonpayment. *Ib.*

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Estates of decedents.

ESTATES OF DECEDENTS—*Continued.*

7. SAME. *Same. Place of sale. Code* 1871, § 1038. *County seat. Confirmation. Effect.*

By confirmation the court makes an administrator's sale its own; Code 1871, § 1038, providing that where no direction is given as to the place of sale an administrator's sale it shall be made at the county seat, does not apply to a decree empowering an administrator to make sale at a place to be determined by him, since the decree gave direction as to the place; and a sale made thereunder, confirmed by the court, is not subject to objection because not made at the county seat. *Ladd v. Craig*, 659.

8. PROBATE OF CLAIMS. *Code* 1892, § 1932. *Code* 1906, § 2106. *Creditor himself must make the affidavit. Husband and wife.*

Code 1892, § 1932 (Code 1906, § 2106), peremptorily requires that the creditors shall make the affidavit therein specified in order to probate a claim against the estate of a decedent; and a husband cannot make the affidavit required to probate his wife's claim, as her agent or otherwise, without reference to reasons given why she failed to make it. *Saunders v. Stephenson*, 676.

9. WILLS. *Construction. Priorities of right.*

Where a will charged testator's estate with the support of his widow, one son and two daughters during the lives of the widow and son and celibacy of the daughters, but provided that after the widow's death, and when the number of those to be supported should not exceed two, if the condition of the estate and the objects to be secured would justify it without trenching on the support of the party or parties entitled thereto, the property should be divided among all of testator's surviving children or their descendants, and on the death of the last survivor of those entitled to support a further division should be made, the right to a preliminary partition was subordinate to the claim for maintenance and could not be granted if the income from the estate was only sufficient to pay it and preserve the property. *Long v. Mayes*, 735.

10. SAME. *"Home."*

A provision in a will that beneficiaries shall be provided with a home, includes everything necessary to maintain the home, such as paying taxes and keeping it in proper repair, but not living expenses involved in the purchasing of supplies. *Ib.*

11. SAME. *Allowance to beneficiaries.*

Whether a sum allowed by the court for support of beneficiaries can be increased or diminished, or ought to be, and when a division of the property can be made under the will, being matters

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ESTATES OF DECEDENTS—*Continued.*

for future consideration, an order fixing the allowance for the beneficiaries' support is properly made subject to future modification. *Long v. Mayes*, 735.

12. EXECUTORS AND ADMINISTRATORS. *Final accounts. Unpaid creditor. Effect of order for distribution. Administrator himself a creditor.*

The presentation of an account, in form a final one, by an administrator and a decree of the court approving the same and ordering a distribution of the assets to the heirs of the decedent does not affect the rights of an unpaid creditor whose debt had been probated; as to such debt the estate remains unadministered, although the creditor was himself the administrator. *Oliver v. Smith*, 879.

13. SAME. *Limitations of actions. Probated claim due administrator.*

The statute of limitations do not run against a probated debt due to the administrator from the estate of his intestate. *Ib.*

ESTOPPEL.

1. PARTY WALLS. *Easement. Grant. Necessity. Code* 1906, §§ 3561-3565. *Rights of owners. Executed license.*

Where under an oral agreement adjacent owners erect on their lots a two-story building with a party wall on the boundary and a common hall-way for the second story over the wall, contemplating that the hall-way should be kept open for passage and to light and ventilate the rooms on the second floor:

(*a*) The agreement did not create an easement by grant; and

(*b*) An easement of strict necessity is not implied, where, as here, an intereference with the right of the complainant to have the hall-way unobstructed is remediable at a reasonable expense; and

(*c*) A deed from one of the parties to a third person conveying his lot "together with all improvements thereon, party wall agreements thereunto appertaining, and easements," does not show an easement when none existed before; but

(*d*) The agreement, erection and use of the building constituted an executed license, and the grantee in the deed is estopped to take one-half of the hall-way and erect a permanent structure thereon, interfering with light, ventilation and passage; since

(*e*) The deed is sufficient to put the party on notice that there were party wall agreements, the full nature and extent of which he was required to ascertain. *Binder v. Weinberg*, 817.

2. CORPORATIONS. *Adoption of officer's act. Deeds.*

A written agreement giving a license to a railroad company to locate and use a spur track over the land of a corporation, though

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ESTOPPEL—*Continued.*

signed by its president in his individual name, is the contract of the corporation if it knew of the long use of the track for its benefit and acquiesced therein, and it is estopped to claim that it did not execute the agreement. *Oil Co. v. Railroad Co.*, 58.

EVIDENCE.

1. ACTION OF DECEIT. *Misrepresentations. Prima facie case.*

Proof of a false statement by defendant touching the area of cleared land in a tract he was seeking to sell, materially overstating the number of acres, and that plaintiff bought on the faith thereof, makes out a *prima facie* case against the vendor in an action of deceit by the vendee, although plaintiff gave defendant credit for an honest mistake. *Vincent v. Corbett*, 46.

2. CRIMINAL LAW AND PROCEDURE. *Homicide. Murder. Dying declaration. Sense of impending dissolution.*

The declarations of a dying man are sufficiently shown to have been made under a sense of impending dissolution to make them admissible in evidence, if otherwise competent, if it be shown that the deceased had been informed by his attending physician that there was no hope for his recovery and that he announced, when he made the declarations, that he was going to die, that he could not live and that his stomach was killing him. *Jackson v. State*, 83.

3. SAME. *Same. Killed for nothing.*

A dying declaration is admissible in evidence, where otherwise competent, although it be merely the statement by the declarant that accused killed him for nothing. *Ib.*

4. BOOKS SHOWING BUSINESS TRANSACTIONS.

An entry made in a book used for that purpose by one person in the regular course of business, recording an oral or written report made to him by another in the regular course of business, of a transaction lying in the personal knowledge of the latter, is admissible in evidence, where the practical inconvenience of producing on the stand the numerous persons concerned would, in the particular case, outweigh the probable utility of so doing. *Compress Co. v. Atkinson*, 93.

5. DAMAGE TO GOODS. *Action for.*

In an action for damages to certain lots of cotton, described in a bill of particulars, while stored in defendant's warehouse, each bale of which was evidenced by a separate compress receipt, testimony showing the damage to all the cotton, and identifying the

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Evidence.

EVIDENCE—*Continued.*

damaged bales as the identical cotton delivered to defendant and described in the bill of particulars, and that the damage resulted through defendant's negligent handling of it, was sufficient, and it was not necessary to prove the particular damage to each separate bale. *Compress Co. v. Atkinson*, 93.

6. CRIMINAL LAW AND PROCEDURE. *Rape. Assault to rape. Particulars. Hearsay not admissible.*

In a prosecution for an assault with intent to rape, it is competent for the state to show that the prosecutrix complained soon after the assault, but the particulars of her complain and of the offense as narrated by her are not admissible in evidence. *Frost v. State*, 104.

7. SAME. *Murder. Motive.*

A conviction of murder, otherwise supported by evidence, will not be reversed by the supreme court alone because the motive for the killing was not proved. *House v. State*, 107.

8. SAME. *Dying declaration. Predicate.*

A dying declaration, made after a physician had advised declarant that he could live only a few hours, and spoken, only two hours before his death, immediately following his statement that he believed he was going to die and would like to see his parents and his wife and that if he had to die he would die brave, is not subject to the objection that a proper predicate was not shown for its admission in evidence. *Ib.*

9. SAME. *Same. Competency.*

A dying declaration, which is the direct result of observation through declarant's senses, is admissible; but a declaration which comes from a course of reasoning from collateral facts is inadmissible. *Ib.*

10. SAME. *Same. Opinion. Killed without cause.*

A dying declaration that accused killed declarant without just cause is admissible as a statement of a fact, and is not objectionable as the opinion of the declarant, where the facts of the killing were known to declarant. *Ib.*

11. PAROL TO VARY WRITING. *Failure to seasonably object.*

Objections to the competency of parol testimony as varying the terms of a written instrument cannot be made for the first time in a motion for a new trial. *Anderson v. Maxwell*, 138.

12. SAME. *Grantor and grantee. Rent reserved by parol.*

Where, in an issue between them touching rents, the grantee in an absolute deed permitted the grantors, without objection to prove

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Evidence.

EVIDENCE—*Continued.*

by parol that he reserved the right to collect the rents for the current year, maturing after the execution of the deeds, he cannot after verdict complain of the incompetency of the testimony. *Anderson v. Maxwell*, 138.

13. STATUTE OF FRAUDS. *Business sign. Code* 1906, § 4784. *Trader.*

Proof of one sale does not make the seller a "trader" within the meaning of Code 1906, § 4784, providing that if any person shall transact business, as a trader or otherwise, as agent of another and fail to disclose his principal by a business sign, all property used or acquired in the business shall be liable to his creditors. *Durham v. Slidell Co.*, 140.

14. WRITTEN CONTRACTS. *Parol to show consideration.*

The real consideration for a promissory note and deed of trust securing it, as distinguished from the expressed consideration, may be shown by parol in a suit between the parties to enjoin a foreclosure sale in pais under the deed. *Campbell v. Davis*, 164.

15. PAYMENTS. *Sunday.*

The court will not deny a debtor credit for a payment, accepted and retainend by the creditor, because made on Sunday. *Ib.*

16. ARTICLES OF COPARTNERSHIP. *Parol to vary.*

A written contract for a partnership in the business of "overhauling machinery" cannot be altered by parol evidence showing that one of the partners was to teach the other a trade. *Gross v. Todd*, 168.

17. JUDGMENTS. *Res adjudicata. Series of notes. Defenses.*

A judgment for the plaintiff in a suit on the first of a series of notes given for the same consideration, begun before the maturity of the others, maintaining in part the defense of failure of consideration made by defendant and measuring its extent to be less than the amount of the first note, is *res adjudicata* of and a complete answer to the same defense when made to a suit on the other notes of the series. *Ib.*

18. WAREHOUSEMEN. *Goods destroyed. Fire. Negligence. Burden of proof.*

In an action against a warehouseman for the value of goods destroyed in a fire which burned the warehouse, the burden is on the bailor-plaintiff, in the absence of proof as to the circumstances of the fire, to show that it resulted from the bailee-defendant's negligence. *Railroad Co. v. Hughes*, 242.

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Evidence.

EVIDENCE—*Continued.*

19. STATUTE OF FRAUDS. *Code* 1906, § 4775 (*c*). *Option to buy land. Sufficiency of memorandum. Parol evidence. Loss of profits. Recovery.*

A writing, simply reciting that for a money consideration the defendant gave plaintiff a limited time within which to purchase from him a designated number of acres of timbered lands, lying in two specified counties of the state, at a named price per acre, is:

(*a*) Insufficient under the statute of frauds; and

(*b*) Parol evidence is inadmissible to supplement its deficiencies; and

(*c*) Plaintiff cannot recover, under a declaration which fails to contain the necessary averments of a declaration in a common-law action for fraud and deceit, a loss of profits which he would have made by a resale of the lands but for defendant's breach of the supposed contract. *Scherck v. Moyse*, 259.

20. CRIMINAL LAW AND PROCEDURE. *Confessions. Second confession. Presumption.*

A confession extorted by threats is not admissible in evidence, nor is a subsequent one unless the influence of the threats be shown to have been wholly removed. *Reason v. State*, 290.

21. RAILROADS. *Common carrier. Loss of freight. Bales of cotton. Market value.*

That the owner paid a certain price for cotton is not alone, as a matter of law, sufficient evidence of its market value to justify a recovery of that price in an action against a common carrier for its loss. *Railroad Co. v. Cotton Co.*, 351.

22. CRIMINAL LAW AND PROCEDURE. *Facts calculated to discredit state witness's statements.*

Testimony calculated to cause the jury to doubt the truth of material statements made by a witness for the state in a criminal case should not be rejected; the question as to whether it be purely speculative is for the jury. *Booze v. Yazoo City*, 428.

23. SAME. *Improper argument. Character. Failure to offer.*

It is improper in a criminal case for a prosecuting lawyer to comment in his argument to the jury upon defendant's failure to offer evidence of her previous character; and, proper objection being ineffectually made thereto, it is reversible error unless defendant's guilt be overwhelmingly shown. *Turner v. State*, 458.

24. JUDICIAL NOTICE. *Turpentining pine trees. Effect.*

The court does not judicially know whether or not extracting tur-

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Evidence.

EVIDENCE—*Continued.*

pentine from pine trees causes a substantial damage as the necessary or usual result. *Jefferson Davis County v. Long*, 538.

25. RECEIVERS. *Appointment. Pending cause. Judicial record. Contradiction by parol. Chancery practice.*

While a receiver can be appointed only in a pending suit, it is not permissible in the absence of fraud to contradict the record of his appointment by testimony showing that it was made before the suit was begun. *Bank v. Hardy*, 587.

26. SAME. *Attaching creditors. Priority.*

Where an attaching creditor, after judgment in his favor, moved the chancery court for an order directing its receiver, having custody of the attached and other property of the defendant, to pay his debt or release the property attached, it was not error to deny his motion, in the absence of all evidence touching liens thereon in favor of other creditors, although the attachment was levied before the receiver was appointed. *Adams v. Bank*, 595.

27. SUPREME COURT PRACTICE. *Chancery court finding of fact. Absence of testimony.*

The supreme court will not reverse the finding of a fact by the chancery court, where a witness was examined orally in that court and his testimony is not made of record and is not certified to the supreme court. *Wilson v. Brown*, 608.

28. MUNICIPALITIES. *Streets. Obstructions. Abutting owner. Right to sue for removal. Title. Evidence. Public nuisance.*

In a suit by an abutting owner to compel the removal of an obstruction in a street in front of his property:

(*a*) Complainant does not have to show a fee simple title to the land claimed by him; he need only show such interest therein as entitles him to ingress to and egress from the property; and

(*b*) He may maintain the suit where he suffers injury peculiar to himself and where his right of ingress to and egress from the property is impaired; and

(*c*) It is immaterial that the municipality, having accepted a dedication of the street, had not when the obstruction was erected opened it up its full length. *Shoemaker v. Coleman*, 619.

29. INFERENCES FROM PHYSICAL FACTS.

In action against a railroad company for injuries to property, where the testimony of employes negatives the company's negligence, but the physical facts might justify an inference of negligence, the correctness of the employes' testimony and of the company's negligence are for the jury. *O'Kelly v. Railroad Co.*, 635.

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Evidence.

EVIDENCE—*Continued.*

30. LAND. *Chancery sale. Confirmation. Payment of bid. Sufficient proof.*

A decree confirming an administrator's sale of land, adjudging that it was made in conformity with the decree of sale, together with a recital in the deed to the purchaser that the purchase money had been paid and a charge therewith against the administrator in his accounts, sufficiently prove the payment, in a collateral attack on the sale predicated of its alleged nonpayment. *Ladd v. Craig*, 659.

31. COUNTY SEAT. *Judicial notice.*

Courts take judicial notice of the present location of the county seat of a county and where it has been located in the past. *Ib.*

32. CRIMINAL LAW AND PROCEDURE. *Murder. Evidence. Photographs.*

In a murder case, pictures, not representations of the scene of the homicide, but created by the joint efforts of the state's leading witness, whose testimony is controverted, and a photographic artist, are not admissible in evidence. *Brett v. State*, 669.

33. SAME. *Burglary.*

In a prosecution for burglary, a conversation between a witness and the accused wherein the defendant was informed that he was charged with the crime and that his wife was responsible for the charge is inadmissible in evidence. *Finklea v. State*, 777.

34. SAME. *Same. Ill feeling between husband and wife.*

In a criminal case evidence of ill will between the accused and his wife is inadmissible. *Ib.*

35. SAME. *Witnesses. Husband and wife. State should not call defendant's wife.*

In a criminal case it is improper for the state to call the wife of the defendant as a witness, and compel him in the presence of the jury to object to her as being incompetent. *Ib.*

36. SAME. *New trial. Newly discovered evidence. Impeaching testimony.*

A new trial will not be granted for newly discovered evidence impeaching a witness for the state. *Bailey v. State*, 863.

37. SAME. *Evidence. Self-serving. Homicide. Flight. Failing to escape having opportunity.*

Proof that while awaiting trial defendant had opportunity to escape but refrained and warned an officer of the escape of a fellow prisoner is self-serving and inadmissible, although the state

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Evidence.

EVIDENCE—*Continued.*

has offered evidence of defendant's flight immediately after the homicide. *Bailey v. State*, 863.

88. SAME. *Physical and mental infirmities of defendant. New trial. Newly discovered evidence. Burglary. Intent to rape.*

Where a defendant, unable to make defense or communicate with counsel assigned to defend him because of deafness and limited intelligence, was convicted of burglary with intent to rape, he should be granted a new trial upon the discovery by counsel after the trial of evidence tending to show his innocence. *Thompson v. State*, 901.

89. STATUTE OF FRAUDS. *Code* 1906, § 4775 (*d*). *Agreement not to be performed within one year. Contract of employment to begin in future. Memorandum. Several writings. Case.*

Under the statute of frauds, Code 1906, § 4775 (*d*), providing that an action shall not be brought whereby to charge a defendant or other party upon any agreement which is not to be performed within the space of one year from the making thereof, unless the promise or agreement, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some person by him or her thereunto lawfully authorized:

(*a*) A verbal contract of employment to begin in the future and continue for one year thereafter is within the statute; and

(*b*) A memorandum of a contract, to make it enforceable, must include all the material matters of the agreement, so that resort to parol testimony will be unnecessary, except to show the situation of the parties and the application of the terms used in the writing to the subject-matter; and

(*c*) The memorandum must be signed as provided in the statute; and

(*d*) While the memorandum may consist of several distinct writings, and all of them need not be signed by the party to be charged, they must so relate that the one signed by the party to be charged can be held to be an approval of the unsigned ones in order to bind him to the terms of the contract set forth in them; and

(*e*) The statement in a letter from defendant, responding to one from the plaintiff detailing the terms of the unenforceable verbal contract of employment, in these words, "As for the talk I had with you when you applied for the situation, I expected much from you; that is why I offered you a large salary," was not a consent to the terms of the contract as detailed in plaintiff's letter, and the two writings did not take the case out of the statute.

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EVIDENCE—*Continued.*

(*f*) The statute does not require that the writing shall be executed at any special time before it is offered in evidence. *Fertilizer, etc., Co. v. Reneau*, 904.

EXECUTORS.

See ESTATES OF DECEDENTS.

EXEMPT PROPERTY.

1. HOMESTEAD. *Purchase money. Cost of erecting dwelling house. Husband and wife. Mortgages. Code* 1906, § 2159.

Although Code 1906, § 2159, provides that a husband's conveyance or incumbrance of his homestead shall not be valid unless signed by his wife, a mortgage, executed alone by the husband, to secure the unpaid purchase money for the land and the contract price for erecting the dwelling house constituting the homestead is valid. *Jarvis v. Armstrong*, 145.

2. SAME. *Right to acquire. Head of family. Widower. Temporary absence of children.*

A widower upon moving to this state does not forfeit a right to acquire a homestead here by temporarily leaving his children in school at the place from which he came. *Roberts v. Thomas*, 219.

3. SAME. *Abandonment. Conditional intent to return.*

Where a debtor ceased to reside upon his homestead and acquired a new one, he cannot claim the abandoned premises as exempt from execution, although he has not paid for the new one and constantly intended and still intends to return to the old in case he shall be unable to pay for the new. *Bennett v. Dempsey*, 406.

4. SAME. *Mortgage.*

A mortgage on his homestead, diminishing the value of the mortgagor's interest in the property, does not enlarge the area or value of the land which he may claim as exempt. *Ib.*

5. SAME. *Same. Disposal. Code* 1906, § 2158.

The giving of a mortgage on a homestead is not a disposal thereof, within Code 1906, § 2158, providing that where an owner disposes of exempt property it shall not thereby become liable to his debts. *Ib.*

6. GARNISHMENT. *Exemption suggested. Claimant.*

Where a garnishee has suggested that the debt due from him is claimed by the defendant as being exempt from liability to his creditors, under Code 1906, § 2346, authorizing such procedure, the court can take no further steps in the case until the process

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Exempt property.

EXEMPT PROPERTY—*Continued.*

required by the statute has been served on defendant, and a judgment awarding the funds to a claimant before the service of such process is erroneous. *Railroad Co. v. Badley*, 437.

7. HOMESTEADS. *Husband's conveyance. Joinder of wife. Code* 1892, § 1983.

A deed to the husband's homestead is not invalid, under Code 1892, § 1983, providing that the husband's deed therefor shall not be valid unless the wife join in its execution if she be living with him, where the husband and wife each executed it, with the knowledge and consent of the other, although they did not execute it at the same time. *Howell v. Hill.*

8. DEEDS. *Vendor's lien debt. Junior grantee. Code* 1892, § 2444. *Right or estate in land.*

A purchase money debt for land, secured by a vendor's lien, does not pass to a subsequent grantee in a second warranty deed for the same land, executed by the grantor in the first one, the case not being within Code 1892, § 2444, providing that where a grantor does not own the entire estate which he purports to convey his deed shall nevertheless invest the grantee with whatever "right or estate" he may have had in the lands. *Ib.*

9. HOMESTEAD. *Widow's right. Other heirs. Code* 1906, § 1659. *Partition.*

The widow is entitled, under Code 1906, § 1659, so providing, as against his other heirs, to occupy the exempt homestead of her deceased husband during her widowhood and a partition thereof in the absence of her consent will not be granted irrespective of its value. *Dickerson v. Leslie*, 627.

10. SAME. *Code* 1906, § 2146. *Value limit.*

The provisions of Code 1906, § 2146, exempting a homestead from execution, in so far as they limit its value to a sum not exceeding three thousand dollars, have no application to a controversy between the widow and the other heirs of a deceased homesteader touching her right to occupy the premises and defeat partition. *Ib.*

EX POST FACTO LAWS.

1. CRIMINAL LAW AND PROCEDURE. *Rape. Assault to. Indictment. Code* 1906, § 1359. *Ex post facto law. Code* 1892, § 967.

An indictment predicated of Code 1906, § 1359, a new statute making it a felony, punishable by imprisonment for life or such shorter time as the jury may fix, to assault with intent to forcibly ravish any woman of previous chaste character

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EX POST FACTO LAWS—*Continued.*

(*a*) Cannot be maintained by proof of acts committed before the state becomes operative; nor

(*b*) Be referred to Code 1892, § 967 (re-enacted Code 1906, § 1043), in force at the time of the acts, making it a felony, punishable by imprisonment not exceeding ten years, to assault a woman with intent to ravish her. *Barton v. State*, 375.

FIRE ARMS.

1. CRIMINAL LAW AND PROCEDURE. *Code* 1906, § 1045. *Weapons pointing or aiming at another. Indictment. Duplicity.*

An indictment predicated of Code 1906, § 1045, making it an offense to intentionally point *or* aim a gun, pistol, etc., at or towards another, is not double because it charges that defendant pointed *and* aimed a pistol at another. *Coleman v. State*, 860.

2. SAME. *Statutory offenses. Construction. Alternatives.*

Where a statute makes punishable the doing of one thing "or" another, the person who in one transaction does all violates the statute but once, incurring but a single penalty, so that an indictment may properly allege in a single count that defendant did as many of the forbidden things as the pleader chooses, employing the conjunction "and" where the statute uses "or," without subjecting the indictment to the charge of duplicity.

FRAUDS, STATUTE OF.

1. BUSINESS SIGN. *Code* 1906, § 4784. *Trader.*.

Proof of one sale does not make the seller a "trader" within the meaning of Code 1906, § 4784, providing that if any person shall transact business, as a trader or otherwise, as agent of another and fail to disclose his principal by a business sign, all property used or acquired in the business shall be liable to his creditors. *Durham v. Slidell Co.*, 140.

2. EVIDENCE. *Written contracts. Parol to show consideration.*

The real consideration for a promissory note and deed of trust securing it, as distinguished from the expressed consideration, may be shown by parol in a suit between the parties to enjoin a foreclosure sale in pais under the deed. *Campbell v. Davis*, 164.

3. SAME. *Articles of copartnership. Parol to vary.*

A written contract for a partnership in the business of "overhauling machinery" cannot be altered by parol evidence showing that one of the partners was to teach the other a trade. *Gross v. Todd*, 168.

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FRAUDS, STATUTE OF—*Continued.*

4. CODE 1906, § 4475 (c). *Option to buy land. Sufficiency of memorandum. Parol evidence. Loss of profits. Recovery.*

A writing, simply reciting that for a money consideration the defendant gave plaintiff a limited time within which to purchase from him a designated number of acres of timbered lands, lying in two specified counties of the state, at a named price per acre, is:

(a) Insufficient under the statute of frauds; and

(b) Parol evidence is inadmissible to supplement its deficiencies; and

(c) Plaintiff cannot recover, under a declaration which fails to contain the necessary averments of a declaration in a common-law action for fraud and deceit, a loss of profits which he would have made by a resale of the lands but for defendant's breach of the supposed contract. *Scherck v. Moyse*, 259.

5. PROMISES TO ANSWER FOR DEBT OF ANOTHER.

An agreement by the owner of a building to become liable as surety for material furnished his contractor is within the statute of frauds. *Vicksburg Mfg., etc., Co. v. Construction Co.*, 282.

6. CODE 1906, § 4779. *Parol sale of chattels. Delivery of part. Payment.*

Where, under an oral contract for the sale of cotton for a price exceeding fifty dollars, the purchaser actually received and paid for a part thereof, the case is not within Code 1906, § 4779, providing that a parol contract for the sale of personalty, for the price of fifty dollars or upwards, shall not be allowed to be valid unless the buyer shall receive the same or a part thereof, or shall actually pay or secure the purchase money or a part thereof. *Moreland v. Cotton Co.*, 572.

7. SALES. *Delivery. Question for jury.*

Where the question of a delivery of chattels under an agreement to sell is material and, from the facts of the case although shown by undisputed testimony, different conclusions touching it could reasonably be drawn, the case is one for a jury and a peremptory instruction should be denied. *Ib.*

8. SAME. *Trial. Reopening case. Discretion of the court.*

Where, in an action for the price of chattels, defendant's case rested upon the existence of an alleged custom, plaintiff should be permitted to reopen his case, after having rested and a peremptory instruction had been requested by defendant, and to show the non-existence of such custom, if he could; and an abuse of judicial discretion in this regard will be reversible error. *Ib.*

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FRAUDS, STATUTE OF—*Continued.*

9. CODE 1906, § 4775 (*d*). *Agreement not to be performed within one year. Contract of employment to begin in future. Memorandum. Several writings. Case.*

Under the statute of frauds, Code 1906, § 4775 (*d*), providing that an action shall not be brought whereby to charge a defendant or other party upon any agreement which is not to be performed within the space of one year from the making thereof, unless the promise or agreement, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some person by him or her thereunto lawfully authorized:

(*a*) A verbal contract of employment to begin in the future and continue for one year thereafter is within the statute; and

(*b*) A memorandum of a contract, to make it enforceable, must include all the material matters of the agreement, so that resort to parol testimony will be unnecessary, except to show the situation of the parties and the application of the terms used in the writing to the subject-matter; and

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(*d*) While the memorandum may consist of several distinct writings, and all of them need not be signed by the party to be charged, they must so relate that the one signed by the party to be charged can be held to be an approval of the unsigned ones in order to bind him to the terms of the contract set forth in them; and

(*e*) The statement in a letter from defendant, responding to one from the plaintiff detailing the terms of the unenforceable verbal contract of employment, in these words, "As for the talk I had with you when you applied for the situation, I expected much from you; that is why I offered you a large salary," was not a consent to the terms of the contract as detailed in plaintiff's letter, and the two writings did not take the case out of the statute; and

(*f*) The statute of frauds does not require that the writing shall be executed at any special time before it is offered in evidence. *Fertilizer, etc., Co. v. Reneau*, 904.

GARNISHMENT.

1. ATTACHMENTS. *Nonresident defendants. Garnishment. Jurisdiction. Efforts to procure.*

The debtor of a nonresident cannot, without the consent and against the wishes of his creditors, deposit the sum due in a bank to the credit of a nonresident for the purpose and thereby confer juris-

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GARNISHMENT—*Continued.*

diction of an attachment suit against the creditor on a court of the bank's domicile. *Saxony Mills v. Wagner*, 233.

2. EXEMPTION SUGGESTED. *Claimant.*

Where a garnishee has suggested that the debt due from him is claimed by the defendant as being exempt from liability to his creditors, under Code 1906, § 2346, authorizing such procedure, the court can take no further steps in the case until the process required by the statute has been served on defendant, and a judgment awarding the funds to a claimant before the service of such process is erroneous. *Railroad Co. v. Badley*, 437.

HEAD OF A FAMILY.

HOMESTEADS. *Right to acquire. Head of family. Widower. Temporary absence of children.*

A widower upon moving to this state does not forfeit a right to acquire a homestead here by temporarily leaving his children in school at the place from which he came. *Roberts v. Thomas*, 219.

HOMICIDE.

1. CRIMINAL LAW AND PROCEDURE. *Murder. Indictment. Amendment. Change of name of deceased. Designation by number. Code* 1906, § 1508.

Where on the trial of a murder case the witnesses were uncertain as to the name of the decedent as charged in the indictment, but knew him definitely as "Twelve," referring to his number as a convict, an amendment of the indictment so as to make it charge the murder of one "Twelve," a human being, etc., was permissible, under Code 1906, § 1508, authorizing the amendment of indictments. *Thurmond v. State*, 1.

2. SAME. *Same. Evidence. Dying declaration. Sense of impending dissolution.*

The declarations of a dying man are sufficiently shown to have been made under a sense of impending dissolution to make them admissible in evidence, if otherwise competent, if it be shown that the deceased had been informed by his attending physician that there was no hope for his recovery and that he announced, when he made the declarations, that he was going to die, that he could not live and that his stomach was killing him. *Jackson v. State*, 83.

3. SAME. *Same. Killed for nothing.*

A dying declaration is admissible in evidence, where otherwise

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Homicide.

HOMICIDE—*Continued.*

competent, although it be merely the statement by the declarant that accused killed him for nothing. *Jackson v. State*, 83.

4. SAME. *Prosecuting lawyer. Improper argument. Harmless error.*

A statement by the prosecuting lawyer, in argument to the jury, to the effect that more murders had been committed in the county than elsewhere in the state, and that it was high time for the juries to put a stop to them, does not constitute reversible error where upon objection the court advised the jury that it was improper and should be disregarded. *Ib.*

5. SAME. *Murder. Evidence. Motive.*

A conviction of murder, otherwise supported by evidence, will not be reversed by the supreme court alone because the motive for the killing was not proved. *House v. State*, 107.

6. SAME. *Dying declaration. Predicate.*

A dying declaration, made after a physician had advised declarant that he could live only a few hours, and spoken, only two hours before his death, immediately following his statement that he believed he was going to die and would like to see his parents and his wife and that if he had to die he would die brave, is not subject to the objection that a proper predicate was not shown for its admission in evidence. *Ib.*

7. SAME. *Same. Competency.*

A dying declaration, which is the direct result of observation through declarant's senses, is admissible; but a declaration which comes from a course of reasoning from collateral facts is inadmissible. *Ib.*

8. SAME. *Same. Opinion. Killed without cause.*

A dying declaration that accused killed declarant without just cause is admissible as a statement of a fact, and is not objectionable as the opinion of the declarant, where the facts of the killing were known to the declarant. *Ib.*

9. SAME. *Separation of jury in murder case. Effect.*

A conviction of murder will not be set aside because one of the jurors separated himself from his fellows during their deliberations, where it is highly improbable that he was communicated with during the separation. *Cunningham v. State*, 228.

10. SAME. *Murder. Accidental killing. Manslaughter instructions.*

Where a defendant charged with murder is either manifestly guilty as charged or wholly innocent of the crime a state's instruction

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Homicide.

HOMICIDE—*Continued.*

authorizing a conviction of manslaughter is fatally erroneous. *Stovall v. State*, 373.

11. SAME. *Justification. Self-defense. Apprehension of danger. "Great bodily harm."*

The rule in homicide cases that "great bodily harm," in contemplation of law, does not mean such harm as may be inflicted by mere blows with the hands or feet, is subject to the modification that where deceased was so much larger and stronger than defendant, that defendant was liable to receive great bodily injuries at his hands, he may be justified in using a deadly weapon to protect himself, although deceased was wholly unarmed. *Hill v. State*, 391.

12. SAME. *Murder. Evidence. Photographs.*

In a murder case, pictures, not representations of the scene of the homicide, but created by the joint efforts of the state's leading witness, whose testimony is controverted, and a photographic artist, are not admissible in evidence. *Brett v. State*, 669.

13. SAME. *Instruction. Maliciously. Malice aforethought.*

The word "maliciously," used in an instruction in a murder case, does not convey the same meaning or have the same force and effect as the words "malice aforethought." *Ib.*

14. SAME. *Same. On weight of evidence.*

An instruction in a murder case is not on the weight of evidence where it simply charges that the defendant is guilty of murder if the jury believe from the evidence, beyond a reasonable doubt, that he wilfully and maliciously shot and killed the deceased with a deadly weapon, at a time when defendant was not in imminent danger and when he had no reasonable ground to apprehend such danger. *Ib.*

15. SAME. *Charges already given.*

Where every phase of defendant's case is fully covered by instructions already given at his request, it is not error to refuse further instruction asked by him. *Ib.*

16. EVIDENCE. *Self-serving. Homicide. Flight. Failing to escape having opportunity.*

Proof that while awaiting trial defendant had opportunity to escape but refrained and warned an officer of the escape of a fellow prisoner is self-serving and inadmissible, although the state has offered evidence of defendant's flight immediately after the homicide. *Bailey v. State*, 863.

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HOME, DEFINITION.

See WILLS.

HOMESTEAD.

See EXEMPT PROPERTY.

HUSBAND AND WIFE.

1. HOMESTEADS. *Purchase money. Cost of erecting dwelling house. Mortgages. Code* 1906, § 2159.

Although Code 1906, § 2159, provides that a husband's conveyance or incumbrance of his homestead shall not be valid unless signed by his wife, a mortgage, executed alone by the husband, to secure the unpaid purchase money for the land and the contract price for erecting the dwelling house constituting the homestead is valid. *Jarvis v. Armstrong*, 145.

2. CONVEYANCES BETWEEN. *Code* 1892, § 2294, *amended Laws* 1900, *ch.* 90, *p.* 130. *Code* 1906, § 2522. *Fire insurance. Unconditional and sole ownership. Unacknowledged and unrecorded deed. Third party.*

An unacknowledged and unrecorded deed from a wife to her husband is valid as between the parties and is operative to invest the husband with title within the meaning of the "unconditional and sole ownership" clause of a fire insurance policy, the insurer not being a "third party" within the meaning of Code 1892, § 2294, amended Laws 1900, ch. 90, p. 130 (Code 1906, § 2522), providing that a conveyance of lands between husband and wife shall not be valid as against any third person unless in writing, acknowledged and recorded. *Groce v. Insurance Co.*, 201.

3. HOMESTEADS. *Husband's conveyance. Joinder of wife. Code* 1892, § 1983.

A deed to the husband's homestead is not invalid, under Code 1892, § 1983, providing that the husband's deed therefor shall not be valid unless the wife join in its execution if she be living with him, where the husband and wife each executed it, with the knowledge and consent of the other, although they did not execute it at the same time. *Howell v. Hill*, 566.

4. WILLS. *Joint testaments. Revocation. Trusts. Covenant to stand seized. Clouds on title. Suits to remove.*

Where a husband and wife, by a writing stipulated to be operative both as a conveyance and as a will, agreed that on the death of either all of their property, owned at the date of the writing or

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Husband and wife—Ignorance of fact.

HUSBAND AND WIFE—*Continued.*

thereafter acquired, should belong to the other for life, and, at the death of the survivor, should be divided, by commissioners to be appointed for that purpose, one-half to be allotted to their respective designated kindred:

(*a*) Construing the instrument as a covenant to stand seized, the wife could not after the death of the husband, in the absence of fraud or mistake, maintain a suit to cancel it as a cloud on title and have the property, real or personal, vested in her; nor

(*b*) Construing the writing as a mutual or joint will, can she revoke it as to the interest disposed of by the deceased husband. *Robertson v. Robertson*, 645.

5. ESTATES OF DECEDENTS. *Probate of claims. Code* 1892, § 1932. *Code* 1906, § 2106. *Creditor himself must make the affidavit. Husband and wife.*

Code 1892, § 1932 (Code 1906, § 2106), peremptorily requires that the creditors shall make the affidavit therein specified in order to probate a claim against the estate of a decedent; and a husband cannot make the affidavit required to probate his wife's claim, as her agent or otherwise, without reference to reasons given why she failed to make it. *Saunders v. Stephenson*, 676.

6. CRIMINAL LAW AND PROCEDURE. *Evidence. Burglary.*

In a prosecution for burglary, a conversation between a witness and the accused wherein the defendant was informed that he was charged with the crime and that his wife was responsible for the charge is inadmissible in evidence. *Finklea v. State*, 777.

7. SAME. *Same. Ill feeling between husband and wife.*

In a criminal case evidence of ill will between the accused and his wife is inadmissible. *Ib.*

8. WITNESSES. *State should not call defendant's wife.*

In a criminal case it is improper for the state to call the wife of the defendant as a witness, and compel him in the presence of the jury to object to her as being incompetent. *Ib.*

9. DEEDS. *Construction. Property conveyed.*

A deed, naming a wife only as grantor and purporting to convey her crops to be grown, does not convey cotton grown by her husband in which she had no interest, although he signed the deed and some of his personal property was conveyed thereby. *Mills-Guy Co. v. Dickerson*, 874.

IGNORANCE OF FACT.

CRIMINAL LAW AND PROCEDURE. *Intoxicants. Unlawful sale. Beverage. Ignorance no excuse.*

Where intoxicating liquors are sold as a beverage the seller cannot

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IGNORANCE OF FACT.—*Continued.*

escape liability for an unlawful sale by showing that "the goods" were guaranteed by the wholesaler from whom he purchased to be non-intoxicating and that he made the sale honestly so believing. *Bacot v. State*, 225.

IMPRISONMENT FOR DEBT.

DIVORCE. *Alimony. Enforcement of decree. Contempt proceedings.*

Where, in a divorce suit joined with a proceeding in the nature of an attachment in chancery for alimony, the complainant wife obtained a decree against the defendant husband for alimony *pendente lite* and suit money which ordered the husband's codefendants to pay into court the sums admitted by them to be due the husband, the codefendants, debtors of the husband, cannot be adjudged in contempt of court for failure to make payment as directed. *Carper v. Carper*, 598.

INDICTMENT.

1. CRIMINAL LAW AND PROCEDURE. *Murder. Amendment. Change of name of deceased. Designation by number. Code* 1900, § 1508.

Where on the trial of a murder case the witnesses were uncertain as to the name of the decedent as charged in the indictment, but knew him definitely as "Twelve," referring to his number as a convict, an amendment of the indictment so as to make it charge the murder of one "Twelve," a human being, etc., was permissible, under Code 1906, § 1508, authorizing the amendment of indictments. *Thurmond v. State*, 1.

2. SAME. *Robbery.*

An indictment is fatally defective if it charge only that the defendant represented himself to be an officer and threatened to arrest and imprison the prosecutor, and did then and there take and carry away the prosecutor's personal property, of designated value, given defendant by prosecutor through fear of injury to his person. *Blackwell v. State*, 240.

3. SAME. *Rape. Assault to. Code* 1906, § 1359. *Ex post facto law. Code* 1892, § 967.

An indictment predicated of Code 1906, § 1359, a new statute making it a felony, punishable by imprisonment for life or such shorter time as the jury may fix, to assault with intent to forcibly ravish any woman of previous chaste character:

(*a*) Cannot be maintained by proof of acts committed before the statute became operative; nor

(*b*) Be referred to Code 1892, § 967 (re-enacted Code 1906, § 1043), in force at the time of the acts, making it a felony, punishable

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INDICTMENT—*Continued.*

by imprisonment not exceeding ten years, to assault a woman with intent to ravish her. *Barton v. State*, 375.

4. SAME. *Code* 1906, § 1045. *Weapons pointing or aiming at another. Duplicity.*

An indictment predicated of Code 1906, § 1045, making it an offense to intentionally point *or* aim a gun, pistol, etc., at or towards another, is not double because it charges that defendant pointed *and* aimed a pistol at another. *Coleman v. State*, 860.

5. SAME. *Statutory offenses. Construction. Alternatives.*

Where a statute makes punishable the doing of one thing "or" another, the person who in one transaction does all violates the statute but once, incurring but a single penalty, so that an indictment may properly allege in a single count that defendant did as many of the forbidden things as the pleader chooses, employing the conjunction "and" where the statute uses "or," without subjecting the indictment to the charge of duplicity. *Ib.*

INFANTS.

TAX SALES. *Redemption. Suit in chancery.*

An infant, whose land has been sold for delinquent taxes, may sue in the chancery court to redeem the same from the tax sale without waiting to become twenty-one years of age. *Day v. Tucker*, 222.

INJUNCTIONS.

1. CHANCERY PLEADING. *Amendment of bill.*

In determining whether an injunction granted on an original bill shall be dissolved, an amended bill should be looked to; and it will not be dissolved where the same injunction in effect should be granted on the amended bill, which is at the same time under consideration. *Oil Mill v. Railroad Co.*, 58.

2. SAME. *Amending bill. Changing cause of action.*

An amended bill does not change the cause of action, where the foundation fact, a certain agreement for a spur track of a railroad, is the same, and the other facts are practically the same, except that the pleader draws different conclusions and makes different special prayers for relief; the object of both bills for injunction being the same, to enable another railroad than defendant to run its track into complainant's yard, the first bill drawing the conclusion that the materials in the track were complainant's property, the agreement under which the road was constructed on its land having been made without its authority,

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INJUNCTIONS—*Continued.*

and praying that defendant be restrained from interfering with the crossing of and connection with the track by the other railroad, and the amended bill drawing the correct conclusion that the agreement was a license, which complainant had revoked, and specially praying that defendant be restrained from using the land for the track and be required to remove it. *Oil Mill v. Railroad Co.*, 58.

3. RAILROADS. *Stations. Change of route. Location of depots.*

A railroad company having constructed a depot building on a new line through a municipality, cannot, after being perpetually enjoined from abandoning its old route, be restrained from moving the depot to the old route, although the location of a depot was not directly involved in the former litigation. *Cooper v. Mobile, etc., R. Co.*, 412.

4. PUBLIC SCHOOLS. *Equity. Invalid school rule.*

Equity has jurisdiction to enjoin the trustees and teachers of a public school from enforcing an invalid rule. *Hobbs v. Germany*, 469.

5. CHANCERY PRACTICE. *Bond. Code* 1906, § 610.

A bond, as required by Code 1906, § 610, is essential to the issuance of an injunction and one issued without it is void. *Castleman v. State*, 609.

6. SAME. *Same. Restraining order.*

Where, upon an application for injunction, a citation is issued requiring defendants to show cause why the injunction should not issue, the court cannot also issue a restraining order pending the hearing, as the order to show cause implies that defendant should not be restrained until after hearing. *Ib.*

7. SAME.

A restraining order, upon issuing citation to show cause why an injunction should not be granted, is foreign to the practice in this state. *Ib.*

8. SAME. *Violating injunction. Contempt.*

Where defendants were only charged with contempt for violating a restraining order, and the issues were made upon the violation of that order, they can only be tried on the charge as made; and the fact that the restraining order was issued on a bill amendatory of another bill on which a valid injunction had been granted was immaterial, as the order and bills must be considered separately. *Ib.*

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INJUNCTIONS—*Continued.*

9. SAME.

A restraining order being void, defendant could not be adjudged guilty of contempt for violating it. *Castleman v. State*, 609.

INSANITY.

WILLS. *Insanity apparent from the instrument. Suicide. Supreme court practice.*

Where an alleged will, drawn in contemplation of suicide, contains matters irreconcilable with all theories of sanity and was manifestly the product of a mind wholly devoid of testamentary capacity, it should be adjudged void, and the supreme court will reverse a decree probating such an instrument. *Johnson v. Stancelle*, 923.

INSTRUCTIONS.

1. ASSAULT. *Rape. Code* 1906, § 1359. *Indictment. Chaste character of woman.*

In order to convict under Code 1906, § 1359, providing that any person convicted of an assault with intent to ravish a woman of previous chaste character shall be punished by imprisonment in the penitentiary for life, or for such time as may be fixed by the jury, the indictment must charge the previous chaste character of the woman. *Frost v. State*, 104.

2. CRIMINAL LAW AND PROCEDURE. *Witnesses. Credibility. Curatives.*

An instruction for the state in a criminal case, wherein defendant testified in his own behalf, authorizing the jury in determining the weight to be given the testimony of any witness to consider his interest in the case, or want of it, and the reasonableness or unreasonableness of his testimony, is not erroneous as pointing out the accused to be disbelieved, where another testified in his behalf of nearly all of the material facts; but if erroneous, the error was cured by another instruction telling the jury that they could not arbitrarily disregard defendant's testimony because he was the defendant, but should give it the same consideration as the testimony of any other witness. *Vails v. State*, 365.

3. SAME. *Homicide. Murder. Accidental killing. Manslaughter instructions.*

Where a defendant charged with murder is either manifestly guilty as charged or wholly innocent of the crime, a state's instruction authorizing a conviction of manslaughter is fatally erroneous. *Stovall v. State*, 373.

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INSTRUCTIONS—*Continued.*

4. RAILROADS. *Master and servant. Servant's injuries. Infants. Rule of company touching employment. Disuse. False affidavit of age.*

Where an infant employe of a railroad company was injured in the course of his employment by the negligence of the company, his infancy in no way contributing thereto, a much disused rule of the company forbidding the employment of infants and an affidavit, made by the plaintiff when seeking the employment, falsely affirming that he was then twenty-one years of age, do not constitute a defense. *Railroad Co. v. Cobb*, 561.

5. DUPLICATING.

Where a requested instruction has already been substantially given its refusal is not error. *Reed v. Railroad Co.*, 639.

6. MURDER. *Maliciously. Malice aforethought.*

The word "maliciously," used in an instruction in a murder case, does not convey the same meaning or have the same force and effect as the words "malice aforethought." *Brett v. State*, 669.

7. SUPREME COURT PRACTICE. *Assignment of error. Peremptory instruction. Argument.*

An assignment of error predicated of a determinative peremptory instruction given by the trial court brings the case into review in the supreme court in all of its aspects, and neither party is confined in argument to points made in the trial court. *Illinois, etc., R. Co. v. State*, 759.

8. HARMLESS ERROR. *Appeal.*

Erroneous instructions on the measure of damages are harmless where the jury find that there is no liability. *Fairfield v. Railroad Co.*, 887.

INSURANCE.

(*Fire.*)

1. RIGHT TO RELIEF. *Delivery of policy. Bill in equity. Discovery. Demurrer.*

Actual delivery of a fire insurance policy into the hands of the insured is not essential to the validity of a contract of insurance, hence, a bill in equity against an insurance agent of several companies and one of his companies, charging that upon complainant's applying to the agent for additional fire insurance he telegraphed the application to one of his companies, believed to be the defendant company, and confirmed his telegram by letter, and that the company accepted the application, thereby completing the contract, and mailed a policy to the agent for delivery to

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INSURANCE—*Continued.*

complainant before the property was burned; that since the fire complainant had tendered the premium but the agent refused to accept it, to deliver the policy and to disclose by which of his companies it was written, discovery and appropriate relief being prayed, is not demurrable. *Niagara Ins. Co. v. Lumber Co.*, 159.

2. HUSBAND AND WIFE. *Conveyances between. Code* 1892, § 2294, *amended Laws* 1900, *ch.* 90, *p.* 130. *Code* 1906, § 2522. *Unconditional and sole ownership. Unacknowledged and unrecorded deed. Third party.*

An unacknowledged and unrecorded deed from a wife to her husband is valid as between the parties and is operative to invest the husband with title within the meaning of the "unconditional and sole ownership" clause of a fire insurance policy, the insurer not being a "third party" within the meaning of Code 1892, § 2294, amended Laws 1900, ch. 90, p. 130 (Code 1906, § 2522), providing that a conveyance of lands between husband and wife shall not be valid as against any third person unless in writing, acknowledged and recorded. *Groce v. Insurance Co.*, 201.

INTOXICATING LIQUORS.

1. UNLAWFUL SALE. *Conviction. General law. Special act.*

A conviction for the unlawful sale of intoxicating liquors can be had under a general law, although the offense was committed in a part of the county subject to a previous local law prohibiting such sales and the penalties prescribed in the two statutes are different. *Borroum v. State*, 88.

2. CRIMINAL LAW AND PROCEDURE. *Unlawful sale. Beverage. Ignorance no excuse.*

Where intoxicating liquors are sold as a beverage the seller cannot escape liability for an unlawful sale by showing that "the goods" were guaranteed by the wholesaler from whom he purchased to be non-intoxicating and that he made the sale honestly so believing. *Bacot v. State*, 225.

3. SAME. *Vinous and Spirituous liquors. Malt liquors. Variance.*

Under an indictmnet charging defendant only with having unlawfully sold vinous and spirituous liquors, he cannot be convicted of having unlawfully sold a malt liquor. *Smith v. State*, 255.

JUDGMENTS.

1. RES ADJUDICATA. *Series of notes. Defenses.*

A judgment for the plaintiff in a suit on the first of a series of notes given for the same consideration, begun before the maturity of the others, maintaining in part the defense of failure

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JUDGMENTS—*Continued.*

of consideration made by defendant and measuring its extent to be less than the amount of the first note, is *res adjudicata* of and a complete answer to the same defense when made to a suit on the other notes of the series. *Gross v. Todd*, 168.

2. JUDGMENT BY DEFAULT. *Entry of appearance. Several defendants. No process served on one. Order of court.*

In a suit against several defendants, upon one of whom there was no valid service of process, a judgment by default cannot be maintained against the one not served predicated alone of an order of the trial court allowing "defendants" time within which to plead, although taken after the expiration of the time allowed. *Day Lumber, etc., Co. v. Bank*, 212.

3. WANT OF NOTICE. *Justice of the peace. Appeal. Circuit court.*

A defendant against whom a judgment has been rendered in a justice's court without notice, may assail its validity on direct appeal to the circuit court. *Adams v. Insurance Co.*, 433.

JUDICIAL SALES.

See SALES.

JURIES.

CRIMINAL LAW AND PROCEDURE. *Separation of jury in murder case. Effect.*

A conviction of murder will not be set aside because one of the jurors separated himself from his fellows during their deliberations, where it is highly improbable that he was communicated with during the separation. *Cunningham v. State*, 228.

JURISDICTION.

1. SUPREME COURT. *Suit begun in justice's court. Amount in controversy. Appeal. Code* 1906, § 86.

Under Code 1906, § 86, authorizing an appeal from the circuit court to the supreme court in cases originating in a justice of the peace court only where the amount in controversy exceeds fifty dollars, the supreme court has no jurisdiction of and will dismiss an appeal in a case so originating where the amount in controversy does not exceed said sum, although the parties have agreed that the record should be so amended as to formally show that the amount exceeded said sum. *Switzer v. Benny*, 209.

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JURISDICTION—*Continued.*

2. SAME. *Constitutional Law. Constitution* 1890, *sec.* 147. *Reversals forbidden in certain cases. Removal of causes from chancery to circuit courts.*

Under Constitution of 1890, sec. 147, providing that the supreme court shall not reverse a decree of the chancery court or judgment of the circuit court on the ground of a want of jurisdiction to render the judgment or decree from any error or mistake as to whether the cause in which it was rendered was of equity or common-law jurisdiction, the supreme court, there being no other error, can only affirm the decree or judgment appealed from, and, in the absence of all action on the subject by the court in which the suit was begun, cannot order the removal of a cause from the one court to the other. *Woodville v. Jenks*, 210.

3. ATTACHMENTS. *Nonresident defendants. Garnishments. Efforts to procure.*

The debtor of a nonresident cannot, without the consent and against the wishes of his creditors, deposit the sum due in a bank to the credit of a nonresident for the purpose and thereby confer jurisdiction of an attachment suit against the creditor on a court of the bank's domicile. *Saxony Mills v. Wagner*, 233.

JUSTICE OF THE PEACE.

1. SUPREME COURT. *Jurisdiction. Suit begun in justice's court. Amount in controversy. Appeal. Code* 1906, § 86.

Under Code 1906, § 86, authorizing an appeal from the circuit court to the supreme court in cases originating in a justice of the peace court only where the amount in controversy exceeds fifty dollars, the supreme court has no jurisdiction of and will dismiss an appeal in a case so originating where the amount in controversy does not exceed said sum, although the parties have agreed that the record should be so amended as to formally show that the amount exceeded said sum. *Switzer v. Benny*, 209.

2. SUIT BEFORE. *When begun.*

An action is not begun before a justice of the peace until the issuance of a summons therein, although a statement of the cause of action had been previously filed, where plaintiff requested the justice not to issue summons thereon at once. *Stewart v. Petitt*, 769.

3. SAME. *Code* 1906, §§ 687, 728.

Code 1906, § 728, providing that the filing of a declaration in the circuit court shall be the commencement of an action if a summons shall be issued thereon for defendant, if extended to jus-

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JUSTICE OF THE PEACE—*Continued.*

tices' courts by Code 1906, § 687, has no application where the plaintiff directed a postponement of the issuance of a summons. *Stewart v. Petitt*, 769.

LAWS OTHER THAN CODE SECTIONS.

1884, p. 547. Charter of Corinth. Pool rooms. Suppression. *Corinth v. Crittenden*, 41.

1894, p. 49. Process. Foreign corporation. Soliciting agent. *Saxony Mills v. Wagner*, 233.

1900, p. 130. Husband and wife. Conveyances between. *Groce v. Insurance Co.*, 201.

1900, p. 153. Public roads. Contracts. Irregularities. *Quin v. Pike County*, 356.

1906, p. 269. Cotton weigher. Winston county. Powers. *Miller v. Warehouse Co.*, 348.

1908, p. 204. Railroad employes. Fellow-servant. Law prospective. *Givens v. Railroad Co.*, 830.

LEASES.

RIGHTS OF LESSEE. *Waste.*

A lessee of sixteenth-section school lands may in good faith clear up for cultivation such portions of it as a prudent owner in fee would clear for that purpose, but he must leave enough timber for the necessary permanent use and enjoyment of the reversion. *Jefferson Davis County v. Lumber Co.*, 530.

LICENSES.

1. RIGHT GIVEN BY AGREEMENT. *Railroad spur track.*

A writing in the form of an agreement between an oil company and a railroad company, and the successors and assigns of each, reciting that the oil company desired side tracks to facilitate its business, and wherein the oil company agreed to furnish the needed ground and give the railroad company the exclusive possession thereof so long as the agreement lasted and to do the grading and furnish the ties, and by which the railroad company was to construct the tracks and be the owner of them, and the materials therein, with the right on thirty days' notice to abandon the use of them and remove the materials, confers a mere license, not coupled with an interest in the land, and does not grant an estate or easement. *Oil Co. v. Railroad Co.*, 58.

2. SAME. *Revocation. Refunding expense money.*

A mere license to maintain a spur track on the land of the licensor

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LICENSES—*Continued.*

is revocable without refunding to the licensee any sum on account of expenditures made by him in laying the track. *Oil Co. v. Railroad Co.*, 58.

2. INJUNCTION. *Chancery pleading. Amendment of bill.*

In determining whether an injunction granted on an original bill shall be dissolved, an amended bill should be looked to; and it will not be dissolved where the same injunction in effect should be granted on the amended bill, which is at the same time under consideration. *Ib.*

4. SAME. *Amending bill. Changing cause of action.*

An amended bill does not change the cause of action, where the foundation fact, a certain agreement for a spur track of a railroad, is the same, and the other facts are practically the same, except that the pleader draws different conclusions and makes different special prayers for relief; the object of both bills for injunction being the same, to enable another railroad than defendant to run its track into complainant's yard, the first bill drawing the conclusion that the materials in the track were complainant's property, the agreement under which the road was constructed on its land having been made without its authority, and praying that defendant be restrained from interfering with the crossing of and connection with the track by the other railroad, and the amended bill drawing the correct conclusion that the agreement was a license, which complainant had revoked, and specially praying that defendant be restrained from using the land for the track and be required to remove it. *Ib.*

5. PARTY WALLS. *Easement. Grant. Necessity. Code* 1906, §§ 3561–3565. *Rights of owners.*

Where under an oral agreement adjacent owners erect on their lots a two-story building with a party wall on the boundary and a common hall-way for the second story over the wall, contemplating that the hall-way should be kept open for passage and to light and ventilate the rooms on the second floor:

(*a*) The agreement did not create an easement by grant; and

(*b*) An easement of strict necessity is not implied, where, as here, an interference with the right of the complainant to have the hall-way unobstructed is remediable at a reasonable expense; and

(*c*) A deed from one of the parties to a third person conveying his lot "together with all improvements thereon, party wall agreements thereunto appertaining, and easements," does not show an easement when none existed before; but

(*d*) The agreement, erection and use of the building constituted an executed license, and the grantee in the deed is estopped to take

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LICENSES—*Continued.*

one-half of the hall-way and erect a permanent structure thereon, interfering with light, ventilation and passage. ***Binder v. Weinberg,*** 817.

LIENS.

1. MECHANICS' LIENS. *Notice to owner. Requisites.*

Under Code 1906, § 3074, relating to mechanics' liens, and requiring notice from the person furnishing the material, a notice of an unpaid bill for material furnished a contractor, which states that persons giving the notice act as agents only for others, to whom the bill is due, is not a sufficient notice to bind the amount in the hands of the owner of the building; and, as the owner did not owe the alleged principals, the person giving the notice cannot claim that they have paid the amount of the bill to the alleged principals and have been subrogated to their rights against the owner. *Vicksburg Mfg., etc., Co. v. Construction Co.,* 282.

2. SAME. *Appeal and error. Review. Questions considered. Change of issues.*

Where a personal action is brought against a contractor by a materialman for a balance due, and the owner of the building is joined, and an attempt is made to establish a materialman's lien, but no personal judgment is sought against the owner, it cannot be urged, on appeal from an instruction to find for the owner, that the evidence established an independent contract between the owner and the materialman to pay for the material furnished, as the issues on appeal must be the same as those made in the lower court. *Ib.*

3. SAME. *Frauds, statute of. Promises to answer for debt of another.*

An agreement by the owner of a building to become liable as surety for material furnished his contractor is within the statute of frauds. *Ib.*

4. TAXATION. *Void tax sale. Improvements. Compensation for.*

A purchaser of land at tax sale who, in good faith believing that he was the owner, placed valuable and permanent improvements upon it, is entitled to compensation therefor, although his title be void because the land was school land and not taxable when assessed and sold. *Edwards v. Butler,* 678.

5. SALES OF PERSONALTY. *Lien for purchase money. Code* 1906, §§ 3079, 3080. *Proceedings to enforce. Claimant's issue.*

Under Code 1906, §§ 3079, 3080, giving the seller of personalty a lien thereon for the unpaid purchase price while the property

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Liens.

LIENS—*Continued.*

remains in the hands of the first purchaser, and providing that in proceedings to enforce the lien the property shall be dealt with as in an attachment for debt, a third party may in such a proceeding propound a claim to the property and the same should be tried as if the case were an attachment suit. *Quillan v. Paine*, 696.

6. SAME. *Assignment. Building agreement.*

A person who contracts to erect a building for another has the right to assign the money due or to become due to him from the owner on the contract. *Spengler v. Lumber Co.*, 780.

7. SAME. *Same. Assent of debtor. Necessity.*

The assent of the owner to an assignment by a building contractor of the money due and to become due on the contract is not essential to the validity of the assignment. *Ib.*

8. MECHANIC'S AND MATERIALMAN'S LIEN. *Assignee of contractor. Subcontractors. Materialmen. Laborers. Code* 1906, § 3074. *Priority of liens.*

Under Code 1906, § 3074, giving to subcontractors, materialmen and laborers a lien on the amount due by the owner to the contractor upon their giving notice to the owner, an assignee of the principal contractor has the prior right to the fund as against subcontractors, materialmen and laborers serving notice after the assignment. *Ib.*

9. SAME. *Assignment of principal contract. Effect.*

Where a building contractor transferred to a third person the balance due under the contract to secure advancements to aid in the construction of the building, and thereafter the owner paid the sums due on the contract to the assignee, the transfer was an assignment of the funds due and to become due under the contract, but not of the contract itself, and the assignee occupies no relation towards persons furnishing material and labor in the construction or completion of the building. *Ib.*

10. SAME. *Same.*

That the assignee of a building contractor, to whom the balance due and to become due from the owner had been transferred, consented to materialmen and laborers furnishing material and labor in the construction of the building did not affect his rights under the assignment. *Ib.*

11. SAME. *Same.*

The right of a subcontractor, materialman or laborer, under Code 1906, § 3074, to a lien on the amount due from the owner to the

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LIENS—*Continued.*

principal contractor on giving notice to the owner as provided in the statute, is defeated by a *bona fide* assignment by the contractor of the balance due and to become due under the contract, made before the service of such notice, although the assignee did not give them notice of the assignment. *Spengler v. Lumber Co.*, 780.

12. SAME. *Same. Contractor's outside creditor.*

An assignment by a building contractor of the balance due and to become due under the contract for a debt due to the assignee from the assignor, not growing out of the construction of the building, is good as against subcontractors, materialmen and laborers subsequently serving notice on the owner. *Ib.*

13. AGRICULTURAL LIENS. *Civil Code of Louisiana, art.* 3217. *Mortgage creditor.*

Where cotton raised in Louisiana, and under the laws of that state, Civil Code, art. 3217, subject to a statutory lien to secure a debt due for plantation supplies, superior to all mortgages not given to secure a like debt, was by the owner delivered in this state in payment of the debt so secured, a creditor whose debt, not of the same character, was secured by mortgage thereon has no right to complain of the transaction. *Lowenberg v. Lewis-Herman Co.*, 916.

14. PARTNERSHIP. *Partner as agent.*

Where a member of a partnership which conducted a plantation was placed in charge as manager, his contract for supplies to be used in making a crop bound the partnership, especially since his purchases for the preceding year were ratified. *Ib.*

LIMITATIONS.

1. MOTION TO DISMISS APPEAL. *Appeals. Code* 1906, § 3112.

An appeal to the supreme court is barred and will be dismissed on motion, if nothing save the execution of a bond be done in the way of perfecting it before the expiration of the two years allowed therefor by the statute of limitations. Code 1906, § 3112. *Beasley v. Cottrell*, 253.

2. ADVERSE POSSESSION. *Scrambling.*

A mere scrambling possession of land, however long continued, is insufficient to confer title by adverse possession. *Cohn v. Smith*, 517.

4. SAME. *Limitations of actions. Probated claim due administrator.*

The statute of limitations do not run against a probated debt due to the administrator from the estate of his intestate. *Oliver v. Smith*, 879.

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MANSLAUGHTER.

See HOMICIDE.

MARKET VALUE.

RAILROADS. *Common carrier. Loss of freight. Bales of cotton. Evidence.*

That the owner paid a certain price for cotton is not alone, as a matter of law, sufficient evidence of its market value to justify a recovery of that price in an action against a common carrier for its loss. *Railroad Co. v. Cotton Co.*, 351.

MARRIAGE AND DIVORCE.

DIVORCE. *Alimony. Enforcement of decree. Contempt proceedings. Imprisonment for debt.*

Where, in a divorce suit joined with a proceeding in the nature of an attachment in chancery for alimony, the complainant wife obtained a decree against the defendant husband for alimony *pendente lite* and suit money which ordered the husband's codefendants to pay into court the sums admitted by them to be due the husband, the codefendants, debtors of the husband, cannot be adjudged in contempt of court for failure to make payment as directed. *Carper v. Carper*, 598.

MASTER AND SERVANT.

1. RAILROADS. *Death of servant. Suit for. Negligence. Pleadings and proofs. Variance.*

In an action against a railroad company for the wrongful death of a locomotive engineer, a variance between the declaration, charging that the collision resulting in the death was caused by the negligence of defendant's telegraph operator in failing to properly deliver a train order dispatch to the conductor of a train, and evidence, showing that the operator placed the message, with two others, on a table in front of the conductor when he called for orders, instead of delivering it to him and having him read it aloud as required by the rules of the company, and permitted the conductor to depart leaving the order on the table, is not sufficient to defeat a recovery by the plaintiffs. *Railroad Co. v. Farr*, 557.

2. SAME. *Same. Contributory negligence. Proximate cause.*

The acts of a locomotive engineer in remaining in his seat on the right side of his engine while rounding a curve in the track and

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MASTER AND SERVANT—*Continued.*

allowing the fireman to stoke the engine, thereby leaving the track unobserved from the left side of the engine, although the better view ahead could be had from that side, if negligent, are not the proximate cause of his death, resulting from a head-on collision with another train, caused by the negligence of the company, where the decedent could not have prevented the collision had a look out been maintained from the left side. *Railroad Co. v. Farr*, 557.

3. DAMAGES. *Verdict not excessive. Death.*

Facts of the case considered and a verdict in plaintiff's favor, awarding twenty-two thousand five hundred dollars as damages for the wrongful death of a person, adjudged not excessive. *Ib.*

4. RAILROADS. *Servant's injuries. Infants. Rule of company touching employment. Disuse. False affidavit of age.*

Where an infant employe of a railroad company was injured in the course of his employment by the negligence of the company, his infancy in no way contributing thereto, a much disused rule of the company forbidding the employment of infants and an affidavit, made by the plaintiff when seeking the employment, falsely affirming that he was then twenty-one years of age do not constitute a defense. *Railroad Co. v. Cobb*, 561.

5. DAMAGES. *Verdict excessive. Personal injuries.*

Facts of the case considered and a verdict in plaintiff's favor awarding twenty-five thousand dollars as damages for personal injuries adjudged excessive. *Ib.*

MATERIALMEN'S LIENS.

See LIENS.

MECHANIC'S LIENS.

See LIENS.

MISDEMEANORS.

1. CRIMINAL LAW AND PROCEDURE. *Punishment. County contract for working prisoners. Failure to pay fine and costs.*

A convicted misdemeanant, failing to pay the fine and costs imposed on him, must remain in jail, if the county has made no provision for the working of convicts, and the want of such provision does not entitle him to his liberty. *Ex parte Parker*, 899.

2. SAME. *Affidavit charging. Necessity for.*

A conviction for a misdemeanor must be reversed if not predicated of an indictment or affidavit charging the commission of the crime. *Woodson v. State*, 370.

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MISTAKE.

1. HOMESTEADS. *Purchase money. Cost of erecting dwelling house.*

A material mistake by one or both parties to a deed as to the identity, situation, boundaries, title amount or value of the land conveyed by it will warrant appropriate equitable relief, although its terms accord with the intent of the parties. *Allen v. Luckett*, 868.

2. SAME. *One party relying on the representations of the other. Actual fraud not essential.*

Where the purchaser was more familiar than the seller with the boundaries of the land and the grantor, relying on the representation of the grantee, executed a deed, believing that it conveyed a small when it conveyed a large acreage, a court of equity will cancel the deed, although actual fraud was not proved. *Ib.*

MORTGAGES AND DEEDS OF TRUST.

1. HOMESTEADS. *Purchase money. Cost of erecting dwelling house. Husband and wife. Code* 1906, § 2159.

Although Code 1906, § 2159, provides that a husband's conveyance or incumbrance of his homestead shall not be valid unless signed by his wife, a mortgage, executed alone by the husband, to secure the unpaid purchase money for the land and the contract price for erecting the dwelling house constituting the homestead is valid. *Jarvis v. Armstrong*, 145.

2. CHATTEL MORTGAGES. *Promissory note. Attorney's fees. Purchaser of encumbered chattels.*

Where a promissory note, stipulating for the payment of an additional sum as an attorney's fee in case of its being placed in the hands of an attorney for collection, was secured by a recorded chattel mortgage, a purchaser of the chattels from the mortgagors acquires them subject to a lien securing the attorney's fee as well as the original fee, although the recitals of the mortgage descriptive of the note do not mention any promise to pay an attorney's fee. *Tubberville v. Simpson*, 154.

3. DEEDS OF TRUST. *Trustee's fees. Attorney's fees.*

Where a note promising to pay an attorney's fee in case it is placed in the hands of an attorney for collection is secured by a deed of trust, it is proper to charge a fee on sums collected by an attorney before sale under the deed and on sums collected by him after litigation, but not on sums collected by the sole efforts of the trustee, to whom trustee's charges were paid, although turned over to the attorney. *Ib.*

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MORTGAGES AND DEEDS OF TRUST—*Continued.*

4. SAME. *Homestead. Value.*

A mortgage on his homestead, diminishing the value of the mortgagor's interest in the property, does not enlarge the area or value of the land which he may claim as exempt. *Bennett v. Dempsey*, 406.

5. SAME. *Same. Disposal. Code* 1906, § 2158.

The giving of a mortgage on a homestead is not a disposal thereof, within Code 1906, § 2158, providing that where an owner disposes of exempt property it shall not thereby become liable to his debts. *Ib.*

6. AGRICULTURAL LIENS. *Civil Code of Louisiana, art.* 3217. *Mortgage creditor.*

Where cotton raised in Louisiana, and under the laws of that state, Civil Code, art. 3217, subject to a statutory lien to secure a debt due for plantation supplies superior to all mortgages not given to secure a like debt, was by the owner delivered in this state in payment of the debt so secured, a creditor whose debt, not of the same character, was secured by mortgage thereon has no right to complain of the transaction. *Lowenberg v. Lewis-Herman Co.*, 916.

7. PARTNERSHIP. *Partner as agent.*

Where a member of a partnership which conducted a plantation was placed in charge as manager, his contract for supplies to be used in making a crop bound the partnership, especially since his purchases for the preceding year were ratified. *Ib.*

MULTIPLICITY OF SUITS.

EQUITY. *Jurisdiction. Defenses. Legal questions. Facts.*

A bill in equity does not lie to prevent a multiplicity of suits unless the same legal questions and practically the same facts are involved in the suits the separate prosecutions of which are sought to be restrained; and the complainant must have a good, legal or equitable, defense to them. *Railroad Co. v. Barnes*, 484

MUNICIPALITIES.

1. PRIVILEGE TAXES. *Ordinance.*

A city ordinance imposing a municipal privilege tax on five or six classes of dealers in beverages upon whom by the statute a state privilege tax is imposed, does not warrant collection of the municipal tax from the omitted class. *Marco v. Clarksdale*, 4.

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Municipalities.

MUNICIPALITIES—*Continued.*

2. FRANCHISES. *Waterworks. Taxation. Mode of assessment.*

The grant by a city of the exclusive privilege of constructing and operating a waterworks plant therein, and to use the streets for the purpose:

(*a*) Is a franchise;

(*b*) Is property;

(*c*) Is taxable as personalty; and

(*d*) Is not embraced in an assessment of "capital invested in mer chandise and manufacturing." *Adams v. Bullock*, 27.

3. ORDINANCES. *Reasonableness.*

The power of a municipality to pass ordinances is subject to the implied restriction that they shall be reasonable, consistent with the general law, and not destructive of lawful business. *Johnson v. Philadelphia*, 34.

4. SAME. *Example of void ordinance. Code* 1906, § 3340.

A municipal ordinance requiring skating rinks to be closed at six o'clock in the afternoon or evening, and remain closed until six o'clock the next morning, is an unreasonable exercise of the power (Code 1906, § 3340) to regulate, suppress and impose a privilege tax on skating rinks, and is void. *Ib.*

5. CITY OF CORINTH. *Laws* 1884, *p.* 547, *ch.* 403. *Privilege taxes. Code* 1906, § 3893.

The special charter of the city of Corinth (Laws 1884, p. 547, ch. 403), still in force, grants express power to prohibit the keeping of pool and billiard rooms; and an ordinance of the city prohibiting them is not affected by the privilege tax laws of the state, since they (Code 1906, § 3893) provide that the payment of taxes thereunder shall not legalize any business. *Corinth v. Crittenden*, 41.

6. ORDINANCES. *Titles. Code* 1906, § 3406.

The provision of Code 1906, § 3406, requiring the subject-matters of municipal ordinances to be clearly expressed in their titles, is mandatory, and such an ordinance having no title is void. *Sample v. Verona*, 264.

7. CRIMINAL LAW AND PROCEDURE. *Illegal voting. Code* 1906, § 1122. *Municipal election.*

A municipal election is within Code 1906, § 1122, making illegal voting at any election an indictable offense. *Ib.*

8. STREETS. *Obstructions. Abutting owner. Right to sue for removal. Title. Evidence. Public nuisance.*

In a suit by an abutting owner to compel the removal of an obstruction in a street in front of his property:

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Municipalities.

MUNICIPALITIES—*Continued.*

(*a*) Complainant does not have to show a fee simple title to the land claimed by him; he need only show such interest therein as entitles him to ingress to and egress from the property; and

(*b*) He may maintain the suit where he suffers injury peculiar to himself and where his right of ingress to and egress from the property is impaired; and

(*c*) It is immaterial that the municipality, having accepted a dedication of the street, had not when the obstruction was erected opened it up its full length. *Shoemaker v. Coleman*, 619.

9. TAXATION. *Assessments. Changes in values. Code* 1906, § 3422.

Under Code 1906, § 3422, authorizing municipal authorities, at a regular or special meeting held in September or October of each year, to increase or diminish the value of property as assessed for municipal taxation, changes of assessment values made by a municipality after the end of October are void, although made at a metting held pursuant to an adjournment in October. *Biloxi v. Real Estate Co.*, 653.

10. LAYING OUT STREETS. *Eminent domain. Code* 1906, §§ 3337, 4400. *Railroad track crossed.*

A municipality in laying out a new street, or extending an old one, crossing a railroad track, must, as provided in Code 1906, § 3337, adopt the procedure provided in Code 1906, ch. 43, relating to the subject of eminent domain; it cannot proceed in so doing under Code 1906, § 4400, relating to the laying out of highways by counties. *Illinois, etc., R. Co. v. State*, 759.

11. SAME. *Viaduct. Bridge.*

A municipality cannot, by ordinance or otherwise, compel a railroad company to construct a viaduct over its track at a point where a street has not been legally laid out across the same. *Ib.*

12. CONSTITUTIONAL LAW. *Constitution* 1890, *sec.* 17. *Eminent domain. Property. Value. Railroad right of way. Street crossing.*

Under constitution 1890, sec. 17, providing that private property shall not be taken or damaged for public use, except on due compensation first made:

(*a*) Every species of property of value, and every right or interest in property is included; and

(*b*) The term, value, as applied to property, is the price deemed or accepted as equivalent to the utility of the thing; and

(*c*) The law infers value from the term property, and where no value is shown nominal value will be inferred; and

(*d*) A municipality cannot take the right of way of a railroad company, or a part thereof, for a street crossing, except by eminent domain proceedings and due compensation. *Ib.*

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MURDER.

See HOMICIDE.

NAME.

CRIMINAL LAW AND PROCEDURE. *Murder. Indictment. Amendment. Change of name of deceased. Designation by number. Code* 1906, § 1508.

Where on the trial of a murder case the witnesses were uncertain as to the name of the decedent as charged in the indictment, but knew him definitely as "Twelve," referring to his number as a convict, an amendment of the indictment so as to make it charge the murder of one "Twelve," a human being, etc., was permissible, under Code 1906, § 1508, authorizing the amendment of indictments. *Thurmond v. State*, 1.

NEGLIGENCE.

1. WAREHOUSEMEN. *Goods destroyed. Fire. Burden of proof.*

In an action against a warehouseman for the value of goods destroyed in a fire which burned the warehouse, the burden is on the bailor-plaintiff, in the absence of proof as to the circumstances of the fire, to show that it resulted from the bailee defendant's negligence. *Railroad Co. v. Hughes*, 242.

2. RAILROADS. *Injury to persons living in cars. Rules of company.*

A rule of a railroad company, constantly disregarded by it and never brought to the attention of its employes, does not affect its liability for negligence to a member of the family of its extra gang foreman living with him in its camp cars to its knowledge and in accordance with its custom; the foreman and the members of his family never having heard of the rule. *Owens v. Railroad Co.*, 378.

3. SAME. *Degree of care due.*

A railroad company allowing the family of its extra gang foreman to live with him in its camp cars owes them the duty of ordinary care, and cannot escape liability to one of them arising from its negligence by showing simply that it did not wilfully injure her. *Ib.*

4. SAME. *Case. Question for jury.*

Whether a railroad company used the ordinary care which it owed to the members of the family of its foreman, who with its knowledge and consent, and in accordance with its custom, lived with him in its camp cars, is a question for the jury, the plank walk

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Negligence.

NEGLIGENCE—*Continued.*

between the doors of the two cars being only twelve to fourteen inches wide while ordinarily those furnished were thirty to thirty-six inches wide, and the car having, the night before the foreman's daughter was injured by the tilting of the plank while she was crossing it, been put by the company on an unballasted roadbed where one rail of the track was higher than the other. *Owens v. Railroad Co.*, 378.

5. SAME. *Passengers. Riding on platform. Truck left near track.*

Where a passenger is without fault in being upon the lower step of a railway coach he may recover from the company for injuries received by being carried in contact with a truck, negligently left too close to the track. *Bell v. Railway Co.*, 440.

6. SAME. *Same. Contributory negligence. Riding on vestibuled platform.*

A passenger, injured by the negligence of the railroad company, was not as a matter of law guilty of such contributory negligence as will defeat his recovery merely because he was riding at the time of the injury on a vestibuled platform of a moving passenger train. *Johnson v. Railroad Co.*, 447.

7. SAME. *Crossings. Interlocking device. Code* 1906, § 4896. *Duty of companies. Contributory negligence. Imputed negligence. Passengers. Servants.*

Where an interlocking device was maintained by two railroad companies at a crossing of their tracks, authorizing them under Code 1906, § 4896, regulating the subject, to run trains over the crossing without stopping:

(*a*) Both companies are under duty to the public to keep the device in order;

(*b*) Both are liable to the passengers of either for injuries resulting from the defective condition of the device; and

(*c*) The negligence of one of the companies in failing to keep the device in order does not preclude its servants, or their legal representatives, from maintaining suits against the other company for damages, as death, resulting from the defective condition of the device. *Railroad Co. v. Barnes*, 484.

8. PARTY WALL. *Insufficiency. Right of co-owner to rebuild.*

The right of a co-owner to tear down and rebuild an insufficient or dangerous party wall must be so exercised as not to inflict avoidable injury on the owner of the adjoining building and such owner may recover for the negligent exercise of the right. *Lexington Lodge v. Beal*, 521.

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Negligence.

NEGLIGENCE—*Continued.*

9. SAME. *Same. Contributory negligence. Proximate cause.*

The acts of a locomotive engineer in remaining in his seat on the right side of his engine while rounding a curve in the track and allowing the fireman to stoke the engine, thereby leaving the track unobserved from the left side of the engine, although the better view ahead could be had from that side, if negligent, are not the proximate cause of his death, resulting from a head-on collision with another train, caused by the negligence of the company, where the decedent could not have prevented the collision had a look-out been maintained from the left side. *Railroad Co. v. Farr*, 557.

10. RAILROADS. *Passengers. Suit for injury to. Contributory negligence. Evidence. Rule of company. Nonobservance. Instructions.*

In an action by a passenger against a railroad company for injuries caused by a collision while plaintiff was riding in the cupola of a caboose on a freight train, in violation of a rule of the company:

(*a*) Evidence is admissible to show that the rule was unknown to the plaintiff and the public generally, and that it was not enforced, but that passengers were frequently allowed to so ride by conductors and trainmen; and

(*b*) A defendant's instruction to the effect that if plaintiff's occupancy of the cupola contributed "in any way whatsoever" to the injury he could not recover, although defendant was grossly negligent, was erroneous where it disregarded evidence tending to show that the injury was not due to plaintiff being in the cupola, and, aside from such evidence, because only contributory negligence proximately contributing to an injury will bar a recovery, and because plaintiff's contributory negligence will not excuse defendant's gross or willful misconduct. *Reed v. Railroad Co.*, 639.

11. SAME. *Injury to property. Evidence. Inferences from physical facts.*

In actions against a railroad company for injuries to property, where the testimony of employes negatives the company's negligence, but the physical facts might justify an inference of negligence, the correctness of the employes' testimony and of the company's negligence are for the jury. *O'Kelly v. Railroad Co.*, 635.

12. SAME. *Employes. Personal injuries. Hand-car. Fellow-servants.*

Where plaintiff, a laborer belonging to a railroad bridge crew, and his foreman were returning from work on a push car propelled

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NEGLIGENCE—*Continued.*

by a lever car under the control of the track section foreman, and, when nearing the point to which they were destined, the section foreman ordered the speed of the push car to be diminished, whereby the cars were separated, and thereupon the section foreman directed plaintiff to get off the push car and stop it, and plaintiff, while endeavoring to do so, was struck by the lever car and damaged, the injury was due to the gross negligence of the section foreman, a fellow servant of plaintiff, for whose negligence the company was not liable. *Givens v. Railroad Co.*, 830.

NEW TRIALS.

1. CRIMINAL LAW AND PROCEDURE. *Sale of intoxicants. Objections to testimony. Motion for new trial. Supreme court practice.*

Exceptions to rulings on testimony not called to the attention of the trial court in a motion for a new trial will not be cause for reversal by the supreme court. *Borroum v. State*, 88.

2. EVIDENCE. *Parol to vary writing. Failure to seasonably object.*

Objections to the competency of parol testimony as varying the terms of a written instrument cannot be made for the first time in a motion for a new trial. *Anderson v. Maxwell*, 138.

3. SAME. *Grantor and grantee. Rent reserved by parol.*

Where, in an issue between them touching rents, the grantee in an absolute deed permitted the grantors, without objection to prove by parol that he reserved the right to collect the rents for the current year, maturing after the execution of the deed, he cannot after verdict complain of the incompetency of the testimony. *Ib.*

4. CRIMINAL LAW AND PROCEDURE. *Newly discovered evidence. Impeaching testimony.*

A new trial will not be granted for newly discovered evidence impeaching a witness for the state. *Bailey v. State*, 863.

5. SAME. *Physical and mental infirmities of defendant. Newly discovered evidence. Burglary. Intent to rape.*

Where a defendant, unable to make defense or communicate with counsel assigned to defend him because of deafness and limited intelligence, was convicted of burglary with intent to rape, he should be granted a new trial upon the discovery by counsel after the trial of evidence tending to show his innocence. *Thompson v. State*, 901.

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NOTICE.

1. MECHANICS' LIENS. *Notice to owner, Requisites.*

Under Code 1906, § 3074, relating to mechanics' liens, and requiring notice from the person furnishing the material, a notice of an unpaid bill for material furnished a contractor, which states that persons giving the notice act as agents only for others, to whom the bill is due, is not a sufficient notice to bind the amount in the hands of the owner of the building; and, as the owner did not owe the alleged principals, the persons giving the notice cannot claim that they have paid the amount of the bill to the alleged principals and have been subrogated to their rights against the owner. *Vicksburg Mfg., etc., Co. v. Construction Co.*, 282.

2. JUDGMENTS. *Want of notice. Justice of the peace. Appeal. cuit court.*

A defendant against whom a judgment has been rendered in a justice's court without notice, may assail its validity on direct appeal to the circuit court. *Adams v. Insurance Co.*, 433.

3. COUNTY SEAT. *Evidence. Judicial notice.*

Courts take judicial notice of the present location of the county seat of a county and where it has been located in the past. *Ladd v. Craig*, 659.

NUISANC

SKATING RINK.

A skating rink is not a nuisance *per se*. *Johnson v. Philadelphia*, 34.

OPTIONS.

STATUTE OF FRAUDS. *Code* 1906, § 4775 (c). *Option to buy land. Sufficiency of memorandum. Parol evidence. Loss of profits. Recovery.*

A writing, simply reciting that for a money consideration the defendant gave plaintiff a limited time within which to purchase from him a designated number of acres of timbered lands, lying in two specified counties of the state, at a named price per acre, is:

(*a*) Insufficient under the statute of frauds; and

(*b*) Parol evidence is inadmissible to supplement its deficiencies; and

(*c*) Plaintiff cannot recover, under a declaration which fails to contain the necessary averments of a declaration in a common-law action for fraud and deceit, a loss of profits which he would have made by a resale of the lands but for defendant's breach of the supposed contract. *Scherck v. Moyse*, 259.

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ORDINANCES.

See MUNICIPALITIES.

PARTIES.

ESTATES OF DECEDENTS. *Wills. Renunciation by widow. Code* 1906, § 5089. *Commissioners to ascertain widow's interest. Executor may petition for.*

A petition for the appointment of commissioners to ascertain the share of one of the cotenants with excessive rents and ordering under Code 1906, § 5089, governing such cases, may be brought by the executor, all parties in interest including devisees and legatees as well as the widow being made defendants; but such a proceeding is premature if begun before it can be reasonably determined what part of the estate will be left for distribution after the payment of creditors. *Jones v. Jones*, 460.

PARTITION.

1. SALE. *Confirmation. Subsequent reversal of decree.*

Where, upon a nonsuspensive appeal, a partition decree charging the share of one of the cotenants with excessive rents and ordering it sold therefor was reversed by the supreme court because of the excess, confirmation of sale made thereunder, before the reversal, should thereafter be denied the purchaser and a resale for the smaller sum found due be ordered. *George v. Wood*, 268.

2. HOMESTEAD. *Widow's right. Other heirs. Code* 1906, § 1659. *Partition.*

The widow is entitled, under Code 1906, § 1659, so providing, as against his other heirs, to occupy the exempt homestead of her deceased husband during her widowhood and a partition thereof in the absence of her consent will not be granted irrespective of its value. *Dickerson v. Leslie*, 627.

3. SAME. *Code* 1906, § 2146. *Value limit.*

The provisions of Code 1906, § 2146, exempting a homestead from execution, in so far as they limit its value to a sum not exceeding three thousand dollars, have no application to a controversy between the widow and the other heirs of a deceased homesteader touching her right to occupy the premises and defeat partition. *Ib.*

PARTNERSHIP.

1. EVIDENCE. *Articles of copartnership. Parol to vary.*

A written contract for a partnership in the business of "overhauling machinery" cannot be altered by parol evidence showing that

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PARTNERSHIP—*Continued.*

one of the partners was to teach the other a trade. ***Gross v. Todd,*** 168.

2. PARTNERSHIP. *Partner as agent.*

Where a member of a partnership which conducted a plantation was placed in charge as manager, his contract for supplies to be used in making a crop bound the partnership, especially since his purchases for the preceding year were ratified. *Lowenberg v. Lewis-Herman Co.*, 916.

PARTY WALLS.

1. DEEDS. *User.*

Where a deed to a strip of land off of the south side of the grantor's lot reserved a right in the grantor to use the wall which the grantee contemplated building on the north side of the strip, and required openings to be left in the wall, so that the grantor could have access through the grantee's building to the upper floors of any house that he might erect on the balance of his lot, a common wall constructed and used accordingly for many years became and was a party wall. *Lexington Lodge v. Beal*, 521.

2. SAME. *Destruction. Reconstruction.*

Where a party wall, after the destruction of one of the connected buildings, was found to be too weak to support a new and taller building which the owner of the destroyed one wished to erect, he may tear down the old wall and replace it with a new one, although the owner of the other building would be inconvenienced thereby and the old wall is sufficient for his purposes, but the rights of the parties in the new wall will be the same as in the old one. *Ib.*

3. SAME. *Same. Negligence.*

The right of a co-owner to tear down and rebuild an insufficient or dangerous party wall must be so exercised as not to inflict avoidable injury on the owner of the adjoining building and such owner may recover for the negligent exercise of the right. *Ib.*

4. SAME. *Decree sustaining right. Harmless error.*

A decree in equity sustaining the right of an adjoining owner to tear down and reconstruct a defective or insufficient party wall should, without prescribing specifications, provide that the work be done with proper care to avoid needless injury to the adjoining owner, and, ordinarily, require an indemnifying bond to protect defendant against avoidable damage resulting from the work; but a decree will not be reversed on appeal because it prescribes specifications for the work where they are admittedly

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PARTY WALLS—*Continued.*

proper ones, nor because of a failure to require an indemnifying bond from a solvent complainant, no demand having been made therefor by the defendant in the trial court. *Ib.*

4. EASEMENT. *Grant. Necessity. Code* 1906, §§ 3561-3565. *Rights of owners. License. Estoppel.*

Where under an oral agreement adjacent owners erect on their lots a two-story building with a party wall on the boundary and a common hall-way for the second story over the wall, contemplating that the hall-way should be kept open for passage and to light and ventilate the rooms on the second floor:

(*a*) The agreement did not create an easement by grant; and

(*b*) An easement of strict necessity is not implied, where, as here, an interference with the right of the complainant to have the hall-way unobstructed is remediable at a reasonable expense; and

(*c*) A deed from one of the parties to a third person conveying his lot "together with all improvements thereon, party wall agreements thereunto appertaining, and easements," does not show an easement when none existed before; but

(*d*) The agreement, erection and use of the building constituted an executed license, and the grantee in the deed is estopped to take one-half of the hall-way and erect a permanent structure thereon, interfering with light, ventilation and passage; since

(*e*) The deed is sufficient to put the party on notice that there were party wall agreemnts, the full nature and extent of which he was required to ascertain; and

(*f*) The rights of the parties to have the hall-way kept free from obstruction is not within Code 1906, §§ 3561-3566, providing how walls may become party walls, regulating compensation therefor and preventing their removal or impairment in value. *Binder v. Weinberg*, 817.

PATENTS.

CORPORATIONS. *Debts. Stockholders. Directors. Personal liability. Code* 1906, §§ 909, 923, 924. *Patent. Infringement of. Torts.*

The infringement of a patent is a tort, and a judgment against a corporation for damages resulting therefrom is not a debt within the meaning of:

(*a*) Code 1906, § 909, providing that every stockholder of a corporation shall be individually liable for its debts contracted during his ownership of the stock to the extent of any unpaid balance on his subscription therefor, the liability to continue for one year after his transfer of the stock, and that any creditor of the company may sue therefor; nor within

(*b*) Code 1906, § 923, providing that the directors of an insolvent corporation assenting to a diversion of its capital stock or the

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PATENTS—*Continued.*

payment of a dividend, and the stockholder receiving a dividend, shall be jointly liable to the existing creditors of the corporation to the extent of the withdrawal or payment, with interest; nor within

(*c*) Code 1906, § 924, limiting the amount of debts which a trading corporation should contract and making the directors who contracted debts in excess thereof personally liable therefor. ***Avery v. McClure***, 172.

PAYMENT.

SUNDAY.

The court will not deny a debtor credit for a payment, accepted and retainend by the creditor, because made on Sunday. ***Campbell v. Davis***, 164.

PHOTOGRAPHS.

See EVIDENCE.

PLEADING AND PRACTICE.

1. DECLARATIONS. *Writings filed with. Demurrers.*

A declaration at law may so plead the legal effect of a writing filed with it as to present the instrument itself for consideration on the hearing of a demurrer to the pleading. ***Keystone Lumber Yard v. Railroad Co.***, 192.

2. TRIAL. *Reopening case. Discretion of the court.*

Where, in an action for the price of chattels, defendant's case rested upon the existence of an alleged custom, plaintiff should be permitted to reopen his case, after having rested and a peremptory instruction had been requested by defendant, and to show the non-existence of such custom, if he could; and an abuse of judicial discretion in this regard will be reversible error. ***Moreland v. Cotton Co.***, 572.

3. RAILROADS. *Failure to receive passenger. Issue. Instructions.*

In a suit against a railroad company for refusing to receive a passenger, the only defense pleaded or otherwise made being that the train was already full when plaintiff demanded carriage, it is error to instruct the jury that plaintiff cannot recover because of defects in her ticket or evidence of right to transportation. ***Fairfield v. Railroad Co.***, 887.

See ACTIONS AND CHANCERY COURT.

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PRIVILEGE TAXES.

1. MUNICIPALITIES. *Ordinance.*

A city ordinance imposing a municipal privilege tax on five or six classes of dealers in beverages upon whom by the statute a state privilege tax is imposed, does not warrant collection of the municipal tax from the omitted class. *Marco v. Clarksdale*, 4.

2. SAME. *City of Corinth. Laws* 1884, *p.* 547, *ch.* 403. *Code* 1906, § 3893.

The special charter of the city of Corinth (Laws 1884, p. 547, ch. 403), still in force, grants express power to prohibit the keeping of pool and billiard rooms; and an ordinance of the city prohibiting them is not affected by the privilege tax laws of the state, since they (Code 1906, § 3893) provide that the payment of taxes thereunder shall not legalize any business. *Corinth v. Crittenden*, 41.

3. OIL MILLS. *Basis of taxation. Capital. Code* 1906, § 3801.

The "capital" on which privilege taxes on cotton seed oil mills are based, under Code 1906, § 3801, imposing such taxes, is the property invested and used in the business not necessarily the corporate stock. *Crenshaw Oil Co. v. Johnson*, 773.

PROBATE OF CLAIMS.

See ESTATES OF DECEDENTS.

PROCESS.

1. FOREIGN CORPORATIONS. *Process. Code* 1892, § 3433, *Laws* 1894, *ch.* 61, *p.* 49. *Doing business in state.*

A foreign trading corporation having no office or place of business in this state but employing a soliciting agent to obtain orders and send them to the home office, where they are filled by shipments direct to the purchasers, is not doing business in this state, within the meaning of Code 1892, § 3433, amended Laws 1894, ch. 61, p. 49, providing for the service of process on corporations; nor is its soliciting agent "an agent" upon whom process against it can be served. *Saxony Mills v. Wagner*, 233.

2. JUSTICE OF THE PEACE. *Suit before. When begun.*

An action is not begun before a justice of the peace until the issuance of a summons therein, although a statement of the cause of action had been previously filed, where plaintiff requested the justice not to issue summons thereon at once. *Stewart v. Petitt*, 769.

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PROCESS—*Continued.*

3. SAME. *Code* 1906, §§ 687, 728.

Code 1906, § 728, providing that the filing of a declaration in the circuit court shall be the commencement of an action if a summons shall be issued thereon for defendant, if extended to justices' courts by Code 1906, § 687, has no application where the plaintiff directed a postponement of the issuance of a summons. *Stewart v. Petitt*, 769.

PROMISSORY NOTES.

See BILLS AND NOTES.

PUBLIC LANDS.

PUBLIC LANDS. *Sixteenth section. School lands. Lands in lieu. Location. British grants.*

Where the title of a grantee in a British grant was confirmed by an act of congress, the secretary of the treasury was thereafter without power to locate the granted land as school lands, in lieu of a sixteenth section; such a location was absolutely void and not validated by the government's subsequent acquisition of title to the land. *Warren County v. Catchings*, 18.

See SCHOOL LANDS.

RAILROADS.

1. STOPPING TRAINS. *Power of commission. Code* 1906, §§ 4849, 4854.

The Mississippi Railroad Commission is without power to compel a railroad company to stop its passenger train at a point without the limits of a city where it has no regular station although its line crosses the track of another railroad company at the place and the latter maintains a passenger station there; such power is not given by:

(*a*) Code 1906, § 4849, empowering the commission to determine complaints of time schedules and regulate the times for arrivals and departures of trains to and from regular stations; nor

(*b*) Code 1906, § 4854, providing that railroads shall establish and maintain such depots as shall be reasonably necessary for the public convenience and shall stop such of its trains thereat as business and public convenience may require; nor

(*c*) Any other statute of the state. *Gulf, etc., R. Co. v. Railroad Commission*, 124.

2. RAILROAD COMMISSION. *Rule* 10. *Delayage. Declaration for. Necessary averment.*

A declaration against a common carrier for delayage, predicated of rule 10 of the Mississippi Railroad Commission, prescribing a

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Railroads.

RAILROADS—*Continued.*

penalty for delaying shipments "by side-tracking in transit," is demurrable if it fail to charge that the delayage sued for was caused by such side-tracking. *Keystone Lumber Yard v. Railroad Co.*, 192.

3. WAREHOUSEMEN. *Goods destroyed. Fire. Negligence. Burden of proof.*

In an action against a warehouseman for the value of goods destroyed in a fire which burned the warehouse, the burden is on the bailor-plaintiff, in the absence of proof as to the circumstances of the fire, to show that it resulted from the bailee defendant's negligence. *Railroad Co. v. Hughes*, 242.

4. COMMON CARRIER. *Loss of freight. Bales of cotton. Market value. Evidence.*

That the owner paid a certain price for cotton is not alone, as a matter of law, sufficient evidence of its market value to justify a recovery of that price in an action against a common carrier for its loss. *Railroad Co. v. Cotton Co.*, 351.

5. INJURY TO PERSONS LIVING IN CARS. *Negligence. Rules of company.*

A rule of a railroad company, constantly disregarded by it and never brought to the attention of its employes, does not affect its liability for negligence to a member of the family of its extra gang foreman living with him in its camp cars to its knowledge and in accordance with its custom; the foreman and the members of his family never having heard of the rule. *Owens v. Railroad Co.*, 378.

6. SAME. *Degree of care due.*

A railroad company allowing the family of its extra gang foreman to live with him in its camp cars owes them the duty of ordinary care, and cannot escape liability to one of them arising from its negligence by showing simply that it did not wilfully injure her. *Ib.*

7. SAME. *Case. Question for jury.*

Whether a railroad company used the ordinary care which it owed to the members of the family of its foreman, who with its knowledge and consent, and in accordance with its custom, lived with him in its camp cars, is a question for the jury, the plank walk between the doors of the two cars being only twelve to fourteen inches wide, while ordinarily those furnished were thirty to thirty-six inches wide, and the car having, the night before the foreman's daughter was injured by the tilting of the plank while she was crossing it, been put by the company on an unballasted roadbed where on rail of the track was higher than the other. *Ib.*

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Railroads.

RAILROADS—*Continued.*

8. TORTS. *Separate injuries from same act.*

Where plaintiff sustained injuries to his person and property by the same tortious act the different injuries are merely separate items of damage and constitute only one cause of action. *Kimball v. Railroad Co.*, 396.

9. SAME. *Res adjudicata. Splitting cause of action.*

A plaintiff injured in his person and property by the same tortious act, who sued for, recovered and was paid the damages to his property, cannot afterwards recover for the personal injury, since he is not permitted to split up his cause of action. *Ib.*

10. STATIONS. *Change of route. Location of depots.*

A railroad company having constructed a depot building on a new line through a municipality, cannot, after being perpetually enjoined from abandoning its old route, be restrained from moving the depot to the old route, although the location of a depot was not directly involved in the former litigation. *Cooper v. Mobile, etc., R. Co.*, 412.

11. PASSENGERS. *Riding on platform. Truck left near track.*

Where a passenger is without fault in being upon the lower step of a railway coach he may recover from the company for injuries received by being carried in contact with a truck, negligently left too close to the track. *Bell v. Railway Co.*, 440.

12. SAME. *Negligence. Contributory negligence. Riding on vestibuled platform.*

A passenger, injured by the negligence of the railroad company, was not as a matter of law guilty of such contributory negligence as will defeat his recovery merely because he was riding at the time of the injury on a vestibuled platform of a moving passenger train. *Johnson v. Railroad Co.*, 447.

13. CROSSINGS. *Interlocking device. Code* 1906, § 4896. *Duty of companies. Contributory negligence. Imputed negligence. Passengers. Servants.*

Where an interlocking device was maintained by two railroad companies at a crossing of their tracks, authorizing them under Code 1906, § 4896, regulating the subject, to run trains over the crossing without stopping:

(*a*) Both companies are under duty to the public to keep the device in order;

(*b*) Both are liable to the passengers of either for injuries resulting from the defective condition of the device; and

(*c*) The negligence of one of the companies in failing to keep the device in order does not preclude its servants, or their legal rep-

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Railroads.

RAILROADS—*Continued.*

resentatives, from maintaining suits against the other company for damages, or death, resulting from the defective condition of the device. *Railroad Co. v. Barnes*, 484.

14. EQUITY. *Jurisdiction. Multiplicity of suits. Defenses. Legal questions. Facts.*

A bill in equity does not lie to prevent a multiplicity of suits unless the same legal questions and practically the same facts are involved in the suits the separate prosecutions of which are sought to be restrained; and the complainant must have a good, legal or equitable, defense to them. *Ib.*

15. MASTER AND SERVANT. *Servant's injuries. Infants. Rule of company touching employment. Disuse. False affidavit of age.*

Where an infant employe of a railroad company was injured in the course of his employment by the negligence of the company, his infancy in no way contributing thereto, a much disused rule of the company forbidding the employment of infants and an affidavit, made by the plaintiff when seeking the employment, falsely affirming that he was then twenty-one years of age, do not constitute a defense. *Railroad Co. v. Cobb*, 561.

16. DAMAGES. *Verdict excessive. Personal injuries.*

Facts of the case considered and a verdict in plaintiff's favor awarding twenty-five thousand dollars as damages for personal injuries adjudged excessive.

17. MASTER AND SERVANT. *Death of servant. Suit for. Negligence. Pleadings and proofs. Variance.*

In an action against a railroad company for the wrongful death of a locomotive engineer, a variance between the declaration, charging that the collision resulting in the death was caused by the negligence of defendant's telegraph operator in failing to properly deliver a train order dispatch to the conductor of a train, and evidence, showing that the operator placed the message, with two others, on a table in front of the conductor when he called for orders, instead of delivering it to him and having him read it aloud as required by the rules of the company, and permitted the conductor to depart leaving the order on the table, is not sufficient to defeat a recovery by the plaintiffs. *Railroad Co. v. Farr*, 557.

17. SAME. *Same. Contributory negligence. Proximate cause.*

The acts of a locomotive engineer in remaining in his seat on the right side of his engine while rounding a curve in the track and allowing the fireman to stoke the engine, thereby leaving the track unobserved from the left side of the engine, although the

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Railroads.

RAILROADS—*Continued.*

better view ahead could be had from that side, if negligent, are not the proximate cause of his death, resulting from a head-on collision with another train, caused by the negligence of the company, where the decedent could not have prevented the collision had a look-out been maintained from the left side. *Railroad Co. v. Farr*, 557.

18. DAMAGES. *Verdict not excessive. Death.*
Facts of the case considered and a verdict in plaintiff's favor, awarding twenty-two thousand five hundred dollars as damages for the wrongful death of a person, adjudged not excessive. *Ib.*

19. LIVE STOCK KILLED ON TRACK. *Stock laws. Animals wrongfully at large.*
In an action against a railroad company for killing a mule which escaped from a yard in the night without plaintiff's fault or knowledge, where the evidence, aided by the statute, made the company's liability a question for the jury, a stock ordinance in force in the city had no application to defendant's liability. *O'Kelly v. Railroad Co.*, 635.

20. SAME. *Evidence. Inferences from physical facts.*
In actions against a railroad company for injuries to property, where the testimony of employes negatives the company's negligence, but the physical facts might justify an inference of negligence, the correctness of the employes' testimony and of the company's negligence are for the jury. *Ib.*

21. RAILROADS. *Passengers. Suit for injury to. Contributory negligence. Evidence. Rule of company. Nonobservance. Instructions.*
In an action by a passenger against a railroad company for injuries caused by a collision while plaintiff was riding in the cupola of a caboose on a freight train, in violation of a rule of the company:
(*a*) Evidence is admissible to show that the rule was unknown to the plaintiff and the public generally, and that it was not enforced, but that passengers were frequently allowed to so ride by conductors and trainmen; and
(*b*) A defendant's instruction to the effect that if plaintiff's occupancy of the cupola contributed "in any way whatsoever" to the injury he could not recover, although defendant was grossly negligent, was erroneous where it disregarded evidence tending to show that the injury was not due to plaintiff being in the cupola, and, aside from such evidence, because only contributory negligence proximately contributing to an injury will bar a recovery, and because plaintiff's contributory negligence will not excuse

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RAILROADS—*Continued.*

defendant's gross or wilful misconduct. *Reed v. Railroad Co.*, 639.

22. CARRIERS. *Contracts. Freights. Regulations.*

Contracts for the carriage of freights by common carriers are subject to regulations under the law, and when a lawful regulation has been imposed the carrier cannot evade it by any printed form of contract required to be signed by the shipper. *Railroad Co. v. Bent*, 681.

23. SAME. *Same. Construction.*

Stipulations in contracts for carriage, inserted entirely for the benefit of the carrier, will be strictly construed. *Ib.*

24. SAME. *Same. Constitutional law. Due process of law. Constitution* 1890, *sec.* 14. *Amendment* XIV, *constitution of U. S. Code* 1892, § 4299. *Code* 1906, § 4851. *Interstate commerce.*

Code 1892, § 4851, Code 1906, § 4851, providing that every bill of lading acknowledging the receipt of property for transportation shall be conclusive evidence in the hands of a *bona fide* holder, as against the carrier, that the property had been so received:

(*a*) Makes certain acts voluntarily done by a carrier conclusive, creates a substantive rule of law, and is not invalid as depriving the carrier of property without due process of law; and

(*b*) It is not invalid as a regulation of interstate commerce when applied to interstate shipments; and

(*c*) A bill of lading issued by a common carrier describing a shipment of cotton linters as containing a designated number of pounds is conclusive on the carrier as to the weight, in the hands of a *bona fide* holder, although the same contain, printed above the column for the insertion of weights, the words, "Weights subject to correction." *Ib.*

25. CONSTITUTIONAL LAW. *Constitution* 1890, *sec.* 193. *Master and servant. Fellow-servants. Negligence. Constitution of United States Am.* XIV. *Laws* 1908, *ch.* 194, *p.* 204.

Constitution 1890, sec. 193, providing that every employe of any railroad corporation shall have the same rights and remedies for injury from the act or omission of the corporation or its employes allowed by law to persons not employes where it results from the negligence of a superior agent or officer, or a person having the right to control or direct the services of the party injured, and when the injury results from the negligence of a fellow servant in another department of labor from that of the party injured or of a fellow servant on another train of cars, or one engaged about a different piece of work;

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RAILROADS—*Continued.*

(*a*) Only applies to commercial railroads, railroads proper, carrying freight and passengers; since

(*b*) The classification of such railroads is predicated of the inherent danger attending their operation, and if construed to embrace others the section would violate the fourteenth amendment to the constitution of the United States, securing an equal protection of the laws to all litigants; and

(*c*) The employes of such railroad corporations proper can only recover of them when injured by reason of the perils attending their operation; and

(*d*) Hand cars are not more inherently dangerous than other modes of transportation not in any way connected with railroads proper and not used on the tracks of such railroads, and are not within the section; and

(*e*) Laws 1908, ch. 194, p. 204, purporting to extend the protection of the section to a new class of employes, is prospective and furnishes no relief to an employe injured before its adoption. *Givens v. Railroad Co.*, 830.

26. SAME. *Case.*

Where plaintiff, a laborer belonging to a railroad bridge crew, and his foreman were returning from work on a push car propelled by a lever car under the control of the track section foreman, and, when nearing the point to which they were destined, the section foreman ordered the speed of the push car to be diminished, whereby the cars were separated, and thereupon the section foreman directed plaintiff to get off the push car and stop it, and plaintiff, while endeavoring to do so, was struck by the lever car and damaged, the injury was due to the gross negligence of the section foreman, a fellow servant of plaintiff, for whose negligence the company was not liable. *Ib.*

27. FAILURE TO RECEIVE PASSENGER. *Pleadings. Issue. Instructions.*

In a suit against a railroad company for refusing to receive a passenger, the only defense pleaded or otherwise made being that the train was already full when plaintiff demanded carriage, it is error to instruct the jury that plaintiff cannot recover because of defects in her ticket or evidence of right to transportation. *Fairfield v. Railroad Co.*, 887.

28. SAME. *Passengers. Coupon ticket. "Void if detached" provision on. on.*

A condition on a railroad coupon ticket, that the coupons are "void if detached" must be reasonably construed to prevent injustice, and the holder cannot be denied passage merely because the

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RAILROADS—*Continued.*

coupon has been inadvertently detached, if both parts are presented and it can be seen by inspection that they correspond. *Fairfield v. Railroad Co.*, 887.

29. ROAD BED. *Maintenance. Overflow of land. Adjustment of past damages. Altered construction. Release of future damages.*

Where in the adjustment of a claim for past damages caused by overflows of land, a railroad company makes alterations in its road bed, and, in consideration thereof, the owner released it from future damages caused by the operation of the road as altered, and the alteration consisted partly in the cutting of a ditch on its right of way and the company kept the ditch opened for several years after the adjustment, the release does not operate to relieve the railroad company from damages resulting from a failure to keep the ditch opened. *Lackey v. Railroad Co.*, 893.

RAILROAD BONDS.

See BONDS.

RAILROAD COMMISSION

1. STOPPING TRAINS. *Power of commission. Code* 1906, §§ 4849, 4854.

The Mississippi Railroad Commission is without power to compel a railroad company to stop its passenger train at a point, without the limits of a city, where it has no regular station, although its line crosses the track of another railroad company at the place and the latter maintains a passenger station there; such power is not given by:

(*a*) Code 1906, § 4849, empowering the commission to determine complaints of time schedules and regulate the times for arrivals and departures of trains to and from regular stations; nor

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(*c*) Any other statute of the state. *Gulf, etc., R. Co. v. Railroad Commission*, 124.

2. DELAYAGE. *Rule* 10. *Declaration for. Necessary averment.*

A declaration against a common carrier for delayage, predicated of rule 10 of the Mississippi Railroad Commission, prescribing a penalty for delaying shipments "by side-tracking in transit," is demurrable if it fail to charge that the delayage sued for was caused by such side-tracking. *Keystone Lumber Yard v. Railroad Co.*, 192.

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RAPE.

See ASSAULT WITH INTENT TO RAVISH.

RECEIPTS.

CONSTRUCTION. *Fire and water exception.*

A clause in a warehouse receipt exempting the warehousemen from liability for loss by fire and water did not cover damage from exposure to the ordinary action of the elements, but related to damages from some disaster produced by fire or flood in the nature of an overwhelming catastrophe. *Compress Co. v. Atkinson*, 93.

RECEIVERS.

1. APPOINTMENT. *Pending cause. Judicial record. Contradiction by parol. Evidence. Chancery practice.*

While a receiver can be appointed only in a pending suit, it is not permissible in the absence of fraud to contradict the record of his appointment by testimony showing that it was made before the suit was begun. *Bank v. Hardy*, 587.

2. ATTACHING CREDITORS. *Priority.*

Where an attaching creditor, after judgment in his favor, moved the chancery court for an order directing its receiver, having custody of the attached and other property of the defendant, to pay his debt or release the property attached, it was not error to deny his motion, in the absence of all evidence touching liens thereon in favor of other creditors, although the attachment was levied before the receiver was appointed. *Adams v. Bank*, 595.

REMOVAL OF CAUSES.

SUPREME COURT. *Constitutional Law. Constitution* 1890, *sec.* 147. *Reversals forbidden in certain cases. Removal of causes from chancery to circuit courts.*

Under Constitution of 1890, sec. 147, providing that the supreme court shall not reverse a decree of the chancery court or judgment of the circuit court on the ground of a want of jurisdiction to render the judgment or decree from any error or mistake as to whether the cause in which it was rendered was of equity or common-law jurisdiction, the supreme court, there being no other error, can only affirm the decree or judgment appealed from, and, in the absence of all action on the subject by the court in which the suit was begun, cannot order the removal of a cause from the one court to the other. *Woodville v. Jenks*, 210.

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RES ADJUDICATA.

1. JUDGMENTS. *Series of notes. Defenses.*

A judgment for the plaintiff in a suit on the first of a series of notes given for the same consideration, begun before the maturity of the others, maintaining in part the defense of failure of consideration made by defendant and measuring its extent to be less than the amount of the first note, is *res adjudicata* of and a complete answer to the same defense when made to a suit on the other notes of the series. *Gross v. Todd*, 168.

2. SPLITTING CAUSE OF ACTION.

A plaintiff, injured in his person and property by the same tortious act, who sued for, recovered and was paid the damages to his property, cannot afterwards recover for the personal injury, since he is not permitted to split up his cause of action. *Kimball v. Railroad Co.*, 396.

ROADS AND STREETS.

1. HIGHWAYS. *Improvement and maintenance. Contracts. Laws* 1900, *ch.* 119, *p.* 153. *Bond of contractor.*

Under Laws 1900, ch. 119, p. 153, providing for improving and maintaining the highways by contracts to be let by the board of supervisors, the contractors to execute bonds in a penalty equal to the amount of their respective bids, a contract otherwise proper is not fatally defective because it embraced all of the highways in two supervisors' districts of the county, nor because the penalty of the contractor's bond was by inadvertance a trifle less than his bid. *Quin v. Pike County*, 356.

2. MUNICIPALITIES. *Streets. Obstructions. Abutting owner. Right to sue for removal. Title. Evidence. Public nuisance.*

In a suit by an abutting owner to compel the removal of an obstruction in a street in front of his property:

(*a*) Complainant does not have to show a fee simple title to the land claimed by him; he need only show such interest therein as entitles him to ingress to and egress from the property; and

(*b*) He may maintain the suit where he suffers injury peculiar to himself and where his right of ingress to and egress from the property is impaired; and

(*c*) It is immaterial that the municipality, having accepted a dedication of the street, had not when the obstruction was erected opened it up its full length. *Shoemaker v. Coleman*, 619.

3. SAME. *Laying out streets. Eminent domain. Code* 1906, §§ 3337, 4400. *Railroad track crossed.*

A municipality in laying out a new street, or extending an old one,

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ROADS AND STREETS—*Continued.*

crossing a railroad track, must, as provided in Code 1906, § 3337, adopt the procedure provided in Code 1906, ch. 43, relating to the subject of eminent domain; it cannot proceed in so doing under Code 1906, § 4400, relating to the laying out of highways by counties. *Illinois, etc., R. Co. v. State*, 759.

4. SAME. *Same. Viaduct. Bridge.*

A municipality cannot, by ordinance or otherwise, compel a railroad company to construct a viaduct over its track at a point where a street has not been legally laid out across the same. *Ib.*

5. CONSTITUTIONAL LAW. *Constitution* 1890, *sec.* 17. *Eminent domain. Property. Value. Railroad right of way. Street crossing.*

Under constitution 1890, sec. 17, providing that private property shall not be taken or damaged for public use, except on due compensation first made. A municipality cannot take the right of way of a railroad company, or a part thereof, for a street crossing, except by eminent domain proceedings and due compensation.

ROBBERY.

CRIMINAL LAW AND PROCEDURE. *Indictment.*

An indictment is fatally defective if it charge only that the defendant represented himself to be an officer and threatened to arrest and imprison the prosecutor, and did then and there take and carry away the prosecutor's personal property, of designated value, given defendant by prosecutor through fear of injury to his person. *Blackwell v. State*, 240.

SALES

1. JUDICIAL SALES. *Confirmation. Chancellor's power. Vacation.*

A chancellor is without power in vacation to confirm a judicial sale to which objection is made because of the inadequacy of the price bid for the property. *George v. Wood*, 268.

2. SAME. *Code* 1906, § 657.

The qualifying words, "where there is no contest," in Code 1906, § 657, authorizing the chancellor in vacation to confirm sales and partitions in kind, are applicable to reports of sales as well as to partitions. *Ib.*

3. SAME. *Inadequacy of price. Resale.*

Gross inadequacy of price warrants a refusal to confirm a judicial sale and an order directing a resale of the property. *Ib.*

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Sales.

SALES—*Continued.*

4. SAME. *Reversal of decree after sale but before confirmation. Partition. Excessive charge on share.*

Where, upon a nonsuspensive appeal, a partition decree charging the share of one of the cotenants with excessive rents and ordering it sold therefor was reversed by the supreme court because of the excess, confirmation of sale made thereunder, before the reversal, should thereafter be denied the purchaser and a resale for the smaller sum found due be ordered. *George v. Wood*, 268.

5. STATUTORY CONSTRUCTION. *Amended statute.*

An amended statute must be construed according to its plain and obvious meaning, viewed in its entirety. *Ib.*

6. CONDITIONAL SALES. *Implied obligation. Remedy of seller against third persons. Rescission.*

Where a person contracted to sell a horse in consideration of the buyer's working for him for a specified term, the title to the horse to remain in the seller until paid for, the contract was an entirety, and, the buyer having abandoned his contract, the seller had the right to reclaim the horse from a third person, to whom it had been sold by the buyer; the third person having no better right to it than the buyer had. *Cleary v. Morson*, 278.

7. STATUTE OF FRAUDS. *Code* 1906, § 4779. *Parol sale of chattels. Delivery of part. Payment.*

Where, under an oral contract for the sale of cotton for a price exceeding fifty dollars, the purchaser actually received and paid for a part thereof, the case is not within Code 1906, § 4779, providing that a parol contract for the sale of personalty, for the price of fifty dollars or upwards, shall not be allowed to be valid unless the buyer shall receive the same or a part threof, or shall actually pay or secure the purchase money or a part thereof. *Moreland v. Cotton Co.*, 572.

8. DELIVERY. *Question for jury.*

Where the question of a delivery of chattels under an agreement to sell is material and, from the facts of the case although shown by undisputed testimony, different conclusions touching it could reasonably be drawn, the case is one for a jury and a peremptory instruction should be denied. *Ib.*

9. SAME. *Trial. Reopening case. Discretion of the court.*

Where, in an action for the price of chattels, defendant's case rested upon the existence of an alleged custom, plaintiff should be permitted to reopen his case, after having rested and a peremptory instruction had been requested by defendant, and to

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SALES—*Continued.*

show the non-existence of such custom, if he could; and an abuse of judicial discretion in this regard will be reversible error. *Moreland v. Cotton Co.*, 572.

10. JUDICIAL SALES. *Administrators. Decree for sale of land. Recitals. Service of process. Evidence. Absence of court files.*

In the absence of the court files, a decree authorizing an administrator to sell the lands of his intestate for the payment of debts, reciting that the defendants were duly served with process before its rendition, should not be overthrown by denials that they were so served where the testimony is not clear, overwhelming and convincing. *Ladd v. Craig*, 659.

11. SAME. *Same. Collateral attack. Inadequacy of price.*

On a collateral attack an administrator's sale of lands will not be held void for inadequacy of price, where the sale was made in unsettled and troubled times and the land was subject to a life estate which postponed the purchaser's occupancy for many years. *Ib.*

12. SAME. *Same. Confirmation. Evidence. Payment of bid. Sufficient proof.*

A decree confirming an administrator's sale of land, adjudging that it was made in conformity with the decree of sale, together with a recital in the deed to the purchaser that the purchase money had been paid and a charge therewith against the administrator in his accounts, sufficiently prove the payment, in a collateral attack on the sale predicated of its alleged nonpayment. *Ib.*

13. SAME. *Same. Place of sale. Code* 1871, § 1038. *County seat. Confirmation. Effect.*

By confirmation the court makes an administrator's sale its own; Code 1871, § 1038, providing that where no direction is given as to the place of sale, an administrator's sale, it shall be made at the county seat, does not apply to a decree empowering an administrator to make sale at a place to be determined by him, since the decree gave direction as to the place; and a sale made thereunder, confirmed by the court, is not subject to objection because not made at the county seat. *Ib.*

14. COUNTY SEAT. *Evidence. Judicial notice.*

Courts take judicial notice of the present location of the county seat of a county and where it has been located in the past. *Ib.*

15. SALES OF PERSONALTY. *Lien for purchase money. Code* 1906, §§ 3079, 3080. *Proceedings to enforce. Claimant's issue.*

Under Code 1906, §§ 3079, 3080, giving the seller of personalty a lien thereon for the unpaid purchase price while the property

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SALES—*Continued.*

remains in the hands of the first purchaser, and providing that in proceedings to enforce the lien the property shall be dealt with as in an attachment for debt, a third party may in such a proceeding propound a claim to the property and the same should be tried as if the case were an attachment suit. *Quillan v. Paine*, 696.

SCHOOLS.

1. PUBLIC SCHOOLS. *Equity. Injunction. Invalid school rule.*

Equity has jurisdiction to enjoin the trustees and teachers of a public school from enforcing an invalid rule. *Hobbs v. Germany*, 469.

2. SAME. *School officers. Code* 1906, §§ 4487, 4503. *Rules.*

Code 1906, § 4487, providing that the board of education shall decide all appeals from decisions of county school superintendents, and Code 1906, § 4503, providing that in all controversies arising under the school law the opinion of the superintendent shall be first sought and for appeals therefrom to the board of education, do not exempt school authorities, acting beyond the scope of their powers and in violation of law, from interference by the courts. *Ib.*

3. SAME. *Code* 1906, §§ 4525, 4623. *No control of pupils in their homes.*

Code 1906, § 4525, empowering trustees of public school to prescribe and enforce rules for the government of schools and to suspend and expel pupils for misconduct, and Code 1906, § 4623, authorizing teachers to enforce such rules and hold pupils to account for disorderly conduct on the school premises and on the way to and from school, do not authorize the adoption of a rule requiring pupils to remain at home and study their lessons between designated hours in the evening. *Ib.*

SCHOOL LANDS.

1. PUBLIC LANDS. *Sixteenth section. Lands in lieu. Location. British grants.*

Where the title of a grantee in a British grant was confirmed by an act of congress, the secretary of the treasury was thereafter without power to locate the granted land as school lands, in lieu of a sixteenth section; such a location was absolutely void and not validated by the government's subsequent acquisition of title to the land. *Warren County v. Catchings*, 18.

2. SIXTEENTH SECTIONS. *Title in state.*

The title to the sixteenth sections school lands is in the state, in

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School lands.

SCHOOL LANDS—*Continued.*

trust for the support of the public schools of the township in which the same are respectively situate. *Jefferson Davis County v. Lumber Co.*, 530.

3. SAME. *Waste. Actions for. Counties. Code* 1906, §§ 4695–4716.

Code 1906, §§ 4695–4716, conferring on the counties control of the sixteenth sections of school lands, confers on them all powers necessary to carry out the purposes of the statute, and a county may sue for waste committed in cutting timber on such lands within its borders. *Ib.*

4. SAME. *Delegated power.*

Counties are mere political subdivisions of the state, created to act for the state in local matters, and the rule forbidding the delegation of a delegated power does not prevent the state from acting through them in dealing with sixteenth-sections school lands. *Ib.*

5. SAME. *Leases. Rights of lessee. Waste.*

A lessee of sixteenth-section school lands may in good faith clear up for cultivation such portions of it as a prudent owner in fee would clear for that purpose, but he must leave enough timber for the necessary permanent use and enjoyment of the reversion. *Ib.*

6. SAME. *Same. Commercial purposes.*

The good faith of a lessee of sixteenth-section school land in clearing up portions of it for cultivation is to be determined, if questioned, by a jury, and the jury must determine to what extent he may cut timber from the facts existing at the time. *Ib.*

7. SAME. *Same. Commercial purposes.*

The cutting of timber for commercial purposes from a sixteenth-section school land leasehold is waste, notwithstanding a claim that it was cut for agricultural purposes. *Ib.*

8. SAME. *Waste by lessee.*

A lessee of sixteenth-school land has no right to substantially injure the reversion by destroying the timber thereon, nor by making a non-destructive use thereof. *Jefferson Davis County v. Long*, 538.

9. EVIDENCE. *Judicial notice. Turpentining pine trees. Effect.*

The court does not judicially know whether or not extracting turpentine from pine trees causes a substantial damage as the necessary or usual result. *Ib.*

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SCHOOL LANDS—*Continued.*

10. SCHOOL LANDS. *Waste. Suit for. Declaration. Demurrer.*

A declaration, in an action by a county against a lessee of a school land, alleging that the lessee was committing waste, and making solely a commercial use of the pine timber thereon by extracting crude turpentine is not demurrable. *Jefferson Davis County v. Long*, 538.

SELF-DEFENSE.

See HOMICIDE.

SIXTEENTH SECTIONS.

See SCHOOL LANDS.

STATUTE OF FRAUDS.

See FRAUDS.

STOCK LAWS.

1. RAILROADS. *Live stock killed on track. Animals wrongfully at large.*

In an action against a railroad company for killing a mule which escaped from a yard in the night without plaintiff's fault or knowledge, where the evidence, aided by the statute, made the company's liability a question for the jury, a stock ordinance in force in the city had no application to defendant's liability. *O'Kelly v. Railroad Co.*, 635.

STREETS.

See ROADS AND STREETS.

SUICIDE.

WILLS. *Insanity apparent from the instrument. Supreme court practice.*

Where an alleged will, drawn in contemplation of suicide, contains matters irreconcilable with all theories of sanity and was manifestly the product of a mind wholly devoid of testamentary capacity, it should be adjudged void, and the supreme court will reverse a decree probating such an instrument. *Johnson v. Stancelle*, 923.

SUNDAY.

PAYMENTS.

The courts will not deny a debtor credit for a payment, accepted and retained by the creditor, because made on Sunday. *Campbell v. Davis*, 164.

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SUPREME COURT.

1. CRIMINAL LAW AND PROCEDURE. *Sale of intoxicants. Objections to testimony. Motion for new trial.*

   Exceptions to rulings on testimony not called to the attention of the trial court in a motion for a new trial will not be cause for reversal by the supreme court. *Borroum v. State*, 88.

2. APPEAL. *Abstract question. Dismissal.*

   If a case, involving alone a contest between the parties for an office, be submitted to the supreme court after the expiration of the term for which each claims to have been elected, the court will of its own motion dismiss the appeal as presenting only an abstract question. *Pafhausen v. State*, 103.

3. EVIDENCE. *Parol to vary writing. Failure to seasonably object.*

   Objections to the competency of parol testimony as varying the terms of a written instrument cannot be made for the first time in a motion for a new trial. *Anderson v. Maxwell*, 138.

4. SAME. *Grantor and grantee. Rent reserved by parol.*

   Where, in an issue between them touching rents, the grantee in an absolute deed permitted the grantors, without objection to prove by parol that he reserved the right to collect the rents for the current year, maturing after the execution of the deed, he cannot after verdict complain of the incompetncy of the testimony. *Ib.*

5. DEMURRER TO DECLARATION. *Good causes not assigned.*

   A demurrer to a declaration will not be sustained by the supreme court on a ground not presented to nor passed upon by the trial court. *Keystone Lumber Yard v. Railroad Co.*, 192.

6. JURISDICTION. *Suit begun in justice's court. Amount in controversy. Appeal. Code* 1906, § 86.

   Under Code 1906, § 86, authorizing an appeal from the circuit court to the supreme court in cases originating in a justice of the peace court only where the amount in controversy exceeds fifty dollars, the supreme court has no jurisdiction of and will dismiss an appeal in a case so originating where the amount in controversy does not exceed said sum, although the parties have agreed that the record should be so amended as to formally show that the amount exceeded said sum.

7. CONSTITUTIOAL LAW. *Constitution* 1890, *sec.* 147. *Reversals forbidden in certain cases. Removal of causes from chancery to circuit courts.*

   Under Constitution of 1890, sec. 147, providing that the supreme

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Supreme court.

SUPREME COURT—*Continued.*

court shall not reverse a decree of the chancery court or judgment of the circuit court on the ground of a want of jurisdiction to render the judgment or decree from any error or mistake as to whether the cause in which it was rendered was of equity or common-law jurisdiction, the supreme court, there being no other error, can only affirm the decree or judgment appealed from, and, in the absence of all action one the subject by the court in which the suit was begun, cannot order the removal of a cause from the one court to the other. *Woodville v. Jenks*, 210.

8. MOTION TO DISMISS APPEAL. *Appeals. Limitation. Code* 1906, § 3112.

An appeal to the supreme court is barred and will be dismissed on motion, if nothing save the execution of a bond be done in the way of perfecting it before the expiration of the two years allowed therefor by the statute of limitations. Code 1906, § 3112. *Beasley v. Cottrell*, 253.

9. DECREE SUSTAINING RIGHT. *Harmless error.*

A decree in equity sustaining the right of an adjoining owner to tear down and reconstruct a defective or insufficient party wall should, without prescribing specifications, provide that the work be done with proper care to avoid needless injury to the adjoining owner, and, ordinarily, require an indemnifying bond to protect defendant against avoidable damage resulting from the work; but a decree will not be reversed on appeal because it prescribes specifications for the work where they are admittedly proper ones, nor because of a failure to require an indemnifying bond from a solvent complainant, no demand having been made therefor by the defendant in the trial court. *Lexington Lodge v. Beal*, 521.

10. CHANCERY COURT FINDING OF FACT. *Absence of testimony.*

The supreme court will not reverse the finding of a fact by the chancery court, where a witness was examined orally in that court and his testimony is not made of record and is not certified to the supreme court. *Wilson v. Brown*, 608.

11. ASSIGNMENT OF ERROR. *Peremptory instruction. Argument.*

An assignment of error predicated of a determinative peremptory instruction given by the trial court brings the case into review in the supreme court in all of its aspects, and neither party is confined in argument to points made in the trial court. *Illinois, etc., R. Co. v. State*, 759.

12. APPEAL. *Code* 1906, § 4926. *Damages. Value of land.*

An unsuccessful appeal from a decree cancelling a deed to land and awarding possession, entitles the appellee, under Code 1906,

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SUPREME COURT—*Continued.*

§ 4926, so providing, to recover damages, five per centum on the value of the land *Allen v. Luckett*, 868.

13. HARMLESS ERROR. *Appeal. Instruction.*

Erroneous instructions on the measure of damages are harmless where the jury find that there is no liability. ***Fairfield v. Railroad Co.***, 887.

14. WILLS. *Insanity apparent from the instrument. Suicide.*

Where an alleged will, drawn in contemplation of suicide, contains maters irreconcilable with all theories of sanity and was manifesty the product of a mind wholly devoid of testamentary capacity, it should be adjudged void, and the supreme court will reverse a decree probating such an instrument. ***Johnson v. Stancelle***, 923.

TAXATION.

1. FRANCHISES. *Municipalities. Waterworks. Taxation. Mode of assessment.*

The grant by a city of the exclusive privilege of constructing and operating a waterworks plant therein, and to use the streets for the purpose:

(*a*) Is a franchise;

(*b*) Is property;

(*c*) Is taxable as personalty; and

(*d*) Is not embraced in an assessment of "capital invested in merchandise and manufacturing." *Adams v. Bullock*, 27.

2. MUNICIPALITIES. *Assessments. Changes in values. Code* 1906, § 3422.

Under Code 1906, § 3422, authorizing municipal authorities, at a regular or special meeting held in September or October of each year, to increase or diminish the value of property as assessed for municipal taxation, changes of assessment values made by a municipality after the end of October are void, although made at a meeting held pursuant to an adjournment in October. ***Biloxi v. Real Estate Co.***, 653.

3. ASSESSMENT. *Description of property. "Capital invested in merchandise and manufacturing."*

An assessment for taxation of a waterworks company for "capital invested in merchandise and manufacturing" includes its pipes, hydrants, etc., but not its solvent credits. ***Adams v. Waterworks Co.***, 601.

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TAXATION—*Continued.*

4. VOID TAX SALE. *Improvements. Compensation for.*

A purchaser of land at tax sale who, in good faith believing that he was the owner, placed valuable and permanent improvements upon it, is entitled to compensation therefor, although his title be void because the land was school land and not taxable when assessed and sold. *Edwards v. Butler*, 678.

TAX TITLES.

1. TAX DEEDS. *Filing for redemption. Clerk need not actually indorse. Code* 1906, § 4338.

It is not essential to the validity of a tax deed that the chancery clerk should have marked it "Filed" when the collector deposited it with him under Code 1906, § 4338, requiring the collector to file all conveyances of land sold for taxes in the chancery clerk's office, there to remain, subject to redemption, for two years from the sale. *Brannon v. Pringle*, 215.

2. INFANTS. *Redemption. Suit in chancery.*

An infant, whose land has been sold for delinquent taxes, may sue in the chancery court to redeem the same from the tax sale without waiting to become twenty-one years of age. *Day v. Tucker*, 222.

3. VOID TAX SALE. *Improvements. Compensation for.*

A purchaser of land at tax sale who, in good faith believing that he was the owner, placed valuable and permanent improvements upon it, is entitled to compensation therefor, although his title be void because the land was school land and not taxable when assessed and sold. *Edwards v. Butler*, 678.

TELEPHONE COMPANIES.

PUNITIVE DAMAGES. *Denying service.*

Where a telephone company, in an effort to obey the order of a supervising state commission, abolishing free county telephone service and fixing charges, forwarded a general circular to the managers of its exchanges in the state directing a compliance with the order, and the manager of an exchange, not knowing that the franchise of the company in his city required it to extend such services free to its patrons there, courteously denied plaintiff free county service, until his attention was called to the franchise when he at once communicated with his company and promptly resumed the free service, the company is not liable to plaintiff for punitive damages because of such denial. *Telephone Co. v. Paine*, 883.

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TORTS.

1. TORTS. *Separate injuries from same act.*

Where plaintiff sustained injuries to his person and property by the same tortious act, the different injuries are merely separate items of damage and constitute only one cause of action. ***Kimball v. Railroad Co.***, 396.

2. SAME. *Res adjudicata. Splitting cause of action.*

A plaintiff, injured in his person and property by the same tortious act, who sued for, recovered and was paid the damages to his property, cannot afterwards recover for the personal injury, since he is not permitted to split up his cause of action. *Ib.*

VARIANCE.

1. CRIMINAL LAW AND PROCEDURE. *Vinous and spirituous liquors. Malt liquors*

Under an indictment charging defendant only with having unlawfully sold vinous and spirituous liquors, he cannot be convicted of having unlawfully sold a malt liquor. ***Smith v. State***, 255.

2. RAILROADS. *Master and servant. Death of servant. Suit for. Negligence. Pleadings and proofs.*

In an action against a railroad company for the wrongful death of a locomotive engineer, a variance between the declaration, charging that the collision resulting in the death was caused by the negligence of defendant's telegraph operator in failing to properly deliver a train order dispatch to the conductor of a train, and evidence, showing that the operator placed the message, with two others, on a table in front of the conductor when he called for orders, instead of delivering it to him and having him read it aloud as required by the rules of the company, and permitted the conductor to depart leaving the order on the table, is not sufficient to defeat a recovery by the plaintiffs. ***Railroad Co. v. Farr***, 557.

VENDOR AND VENDEE.

DEEDS. *Vendor's lien debt. Junior grantee. Code* 1892, § 2444. *Right or estate in land.*

A purchase money debt for land, secured by a vendor's lien, does not pass to a subsequent grantee in a second warranty deed for the same land, executed by the grantor in the first one, the case not being within Code 1892, § 2444, providing that where a grantor does not own the entire estate which he purports to convey his deed shall nevertheless invest the grantee with whatever "right or estate" he may have had in the lands. ***Howell v. Hill***, 566.

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VERDICT.

PUNISHMENT.

A defendant convicted of a felony punishable by imprisonment in the penitentiary for life or such shorter time as the jury may fix, cannot, in the absence of a verdict fixing the imprisonment, be sentenced for a term of years fixed by the court. *Barton v. State*, 375.

WAIVER.

WAREHOUSEMEN. *Injury to goods. Limitation of liability. Adjustment before removal of property.*

Where the dealings between warehousemen and the owners of cotton stored with them showed that the parties had disregarded a provision in the warehouse receipts that all claims for damages against the warehousemen should be adjudicated before the cotton was removed, the provision could not be set up as a defense by the warehousemen in an action for damages brought after the removal of the cotton. *Compress Co. v. Atkinson*, 93.

WAREHOUSEMEN.

See BAILMENTS.

WASTE.

1. SCHOOL LANDS. *Leases. Rights of lessee. Waste.*

A lessee of sixteenth-section school lands may in good faith clear up for cultivation such portions of it as a prudent owner in fee would clear for that purpose, but he must leave enough timber for the necessary permanent use and enjoyment of the reversion. *Jefferson Davis County v. Lumber Co.*, 530.

2. SAME. *Same. Commercial purposes.*

The good faith of a lessee of sixteenth-section school land in clearing up portions of it for cultivation is to be determined, if questioned, by a jury, and the jury must determine to what extent he may cut timber from the facts existing at the time. *Ib.*

3. SAME. *Same. Commercial purposes.*

The cutting of timber for commercial purposes from a sixteenth-section school land leasehold is waste, notwithstanding a claim that it was cut for agricultural purposes. *Ib.*

4. SIXTEENTH SECTIONS. *School lands. Waste by lessee.*

A lessee of sixteenth-school land has no right to substantially injure the reversion by destroying the timber thereon, nor by making a non-destructive use thereof. *Ib.*

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WASTE—*Continued.*

5. EVIDENCE. *Judicial notice. Turpentining pine trees. Effect.*

The court does not judicially know whether or not extracting turpentine from pine trees causes a substantial damage as the necessary or usual result. *Jefferson Davis County v. Lumber Co.*, 530.

6. SCHOOL LANDS. *Waste. Suit for. Declaration. Demurrer.*

A declaration, in an action by a county against a lessee of a school land, alleging that the lessee was committing waste, and making solely a commercial use of the pine timber thereon by extracting crude turpentine is not demurrable. *Ib.*

WATERS.

RAILROADS. *Road bed. Maintenance. Overflow of land. Adjustment of past damages. Altered construction. Release of future damages.*

Where in the adjustment of a claim for past damages caused by overflows of land, a railroad company makes alterations in its road bed, and, in consideration thereof, the owner released it from future damages caused by the operation of the road as altered, and the alteration consisted partly in the cutting of a ditch on its right of way and the company kept the ditch opened for several years after the adjustment, the release does not operate to relieve the railroad company from damages resulting from a failure to keep the ditch opened. *Lackey v. Railroad Co.*, 893.

WIDOW.

See WILLS AND EXEMPT PROPERTY.

WIDOWER.

See EXEMPT PROPERTY.

WILLS.

1. CREDIBLE WITNESS. *Code* 1871, § 2388. *Code* 1880, § 1262. *Code* 1892, § 4488. *Code* 1906, § 5078.

The word "credible" in Code 1871, § 2388, providing that if a will is not wholly written and subscribed by testator, it shall be subscribed by three "credible witnesses" in case of a devise of real estate, is synonymous with "competent." *Swanzy v. Kolb*, 10.

2. SAME. *Devise to subscribing witness. Statutes. Code* 1871, § 1101. *Code* 1880, § 1973. *Code* 1892, § 1826. *Code* 1906, § 2001.

Under Code 1871, § 1101, providing that if any person shall be a

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WILLS—*Continued.*

subscribing witness to a will whereby any devise or bequest is made to him, and the will cannot "otherwise be proved," such devise or bequest shall be void and the witness shall be competent as to the residue of the will, as if no such devise or bequest had been made:

(*a*) The words "otherwise be proved" refer to proof of the execution of the will and not to its contents; and

(*b*) A will signed by three witnesses (the then statutory number), to one of whom a devise is given by the will, is not void; the devise is void and the witness competent to establish the residue of the will. *Swanzy v. Kolb*, 10.

3. CONSTRUCTION. *Intention of testator.*

In construing a will the court must ascertain the intention of the testator from the whole scheme of the instrument, giving due weight to every word of it. *Ball v. Phelan*, 293.

4. SAME. *Devises by implication. Validity.*

There can be no devise by implication violative of law or public policy. *Ib.*

5. SAME. *Same.*

A devise by implication must be predicated of a necessary implication, and the probability of testator's intention to make the gift must be so strong as to exclude the idea that the contrary intention existed in his mind. *Ib.*

6. SAME. *Same.*

The rule that a testamentary gift to a person and in case he die without leaving children to another does not raise an implied gift in the children applies only where the first taker is given an absolute interest in the property. *Ib.*

7. SAME. *Construction. Intention of testator.*

The court in construing a will may assume that testator, dictating the will under the influence of family relations, will seldom intentionally cut off the issue of a son or daughter from taking the share of the parent for the benefit of collateral objects. *Ib.*

8. SAME. *Devise by implication.*

Where a will necessarily confines the interest of a child of testator to his life, the court will lay hold of slight circumstances to raise a gift in the issue of such child, and thereby avoid imputing to the testator the intention of giving the property to the devisee over, leaving no provision for the issue of the tenant for life. *Ib.*

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Wills.

WILLS—*Continued.*

9. SAME. *Same.*

Courts will more readily sustain a devise by implication to children on arriving at age or marriage, where some beneficial interest has been given them during minority, than where no interest of any kind has been given them, but whether a devise by implication is to be maintained or not cannot be determined by such test alone. *Ball v. Phelan*, 293.

10. SAME. *Construction. Law governing.*

Though title to real estate is governed solely by the law of the place where the property is situated, yet, where the inquiry is directed to the ascertainment of the intention of the testator from the language of his will, the *lex domicilii* controls. *Ib.*

11. SAME. *Same.*

Where a testator has used in his will technical terms to which the courts of his domicile have attached a settled judicial meaning constituting a rule of property in that state, the courts of other states construing the testament will give to such words the same meaning. *Ib.*

12. SAME. *Same.*

Where the intention of testator violates no law, it stands; but where it violates the law, the will fails unless the legislature has arbitrarily provided, or the courts have by long construction determined, that a certain meaning shall be given to certain technical terms used in the will, which meaning will save the will, though it may result in a different disposition from that which testator intended. *Ib.*

13. SAME. *Same.*

Where testator gave half of his property to his wife for life, then to his daughter, and the other half to the daughter for life, and provided that on her death without issue, or on the death of the issue before marriage or becoming of age, the whole property given to the daughter "all for life" should go to others. The daughter took only a life estate, which could not be enlarged by construction into a fee on the birth of issue, and her children by implication took the fee. *Ib.*

14. ESTATES OF DECEDENTS. *Renunciation by widow. Code* 1906, § 5089. *Commissioners to ascertain widow's interest. Executor may petition for. Parties.*

A petition for the appointment of commissioners to ascertain the share of the widow renouncing the will of her deceased husband, under Code 1906, § 5089, governing such cases, may be brought

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WILLS—*Continued.*

by the executor, all parties in interest including devisees and legatees as well as the widow being made defendants; but such a proceeding is premature if begun before it can be reasonably determined what part of the estate will be left for distribution after the payment of creditors. *Jones v. Jones*, 460.

15. JOINT TESTAMENTS. *Revocation. Trusts. Covenant to stand seized. Husband and wife. Clouds on title. Suits to remove.*

Where a husband and wife, by a writing stipulated to be operative both as a conveyance and as a will, agreed that on the death of either all of their property, owned at the date of the writing or thereafter acquired, should belong to the other for life, and, at the death of the survivor, should be divided, by commissioners to be appointed for that purpose, one-half to be allotted to their respective designated kindred:

(*a*) Construing the instrument as a covenant to stand seized, the wife could not after the death of the husband, in the absence of fraud or mistake, maintain a suit to cancel it as a cloud on title and have the property, real or personal, vested in her; nor

(*b*) Construing the writing as a mutual or joint will, can she revoke it as to the interest disposed of by the deceased husband. *Robertson v. Robertson*, 645.

16. CONSTRUCTION. *Priorities of right.*

Where a will charged testator's estate with the support of his widow, one son and two daughters during the lives of the widow and son and celibacy of the daughters, but provided that after the widow's death, and when the number of those to be supported should not exceed two, if the condition of the estate and the objects to be secured would justify it without trenching on the support of the party or parties entitled thereto, the property should be divided among all of testator's surviving children or their descendants, and on the death of the last survivor of those entitled to support a further division should be made, the right to a preliminary partition was subordinate to the claim for maintenance and could not be granted if the income from the estate was only sufficient to pay it and preserve the property. *Long v. Mayes*, 735.

17. SAME. *"Home."*

A provision in a will that beneficiaries shall be provided with a home, includes everything necessary to maintain the home, such as paying taxes and keeping it in proper repair, but not living expenses involved in the purchasing of supplies. *Ib.*

18. SAME. *Allowance to beneficiaries.*

Whether a sum allowed by the court for support of beneficiaries

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WILLS—*Continued.*

can be increased or diminished, or ought to be, and when a division of the property can be made under the will, being matters for future consideration, an order fixing the allowance for the beneficiaries' support is properly made subject to future modification. *Long v. Mayes*, 735.

19. INSANITY APPARENT FROM THE INSTRUMENT. *Suicide. Supreme court practice.*

Where an alleged will, drawn in contemplation of suicide, contains matters irreconcilable with all theories of sanity and was manifestly the product of a mind wholly devoid of testamentary capacity, it should be adjudged void, and the supreme court will reverse a decree probating such an instrument. *Johnson v. Stancelle*, 923.

WITNESSES.

1. CRIMINAL LAW AND PROCEDURE. *Husband and wife. Failure of husband to call wife. Argument.*

The failure of the husband to call his wife as a witness for him in a criminal case is not a proper subject of comment by counsel. *Johnson v. State*, 91.

2. SAME. *Credibility. Instructions. Curatives.*

An instruction for the state in a criminal case, wherein defendant testified in his own behalf, authorizing the jury in determining the weight to be given the testimony of any witness to consider his interest in the case, or want of it, and the reasonableness or unreasonableness of his testimony, is not erroneous as pointing out the accused to be disbelieved, where another testified in his behalf to nearly all of the material facts; but if erroneous, the error was cured by another instruction telling the jury that they could not arbitrarily disregard defendant's testimony because he was the defendant, but should give it the same consideration as the testimony of any other witness. *Vails v. State*, 365.

3. COSTS. *Witness fees. Code* 1906, § 2200.

A litigant who has been adjudged entitled to recover costs, cannot compel his adversary to pay witness fees, unless the statute, Code 1906, § 2200, regulating the subject has been observed. *Hubbard v. Hemphill*, 388.

4. CRIMINAL LAW AND PROCEDURE. *Evidence. Facts calculated to discredit state witness's statements.*

Testimony calculated to cause the jury to doubt the truth of material statements made by a witness for the state in a criminal

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Witnesses.

WITNESSES—*Continued.*

case should not be rejected; the question as to whether it be purely speculative is for the jury. *Booze v. Yazoo City*, 428.

5. SAME. *Impeachment. Contradiction. Immaterial matter.*

A witness cannot be contradicted upon an immaterial and collateral matter. *Cooper v. State*, 480.

6. SAME. *Husband and wife. State should not call defendant's wife.*

In a criminal case it is improper for the state to call the wife of the defendant as a witness, and compel him in the presence of the jury to object to her as being incompetent. *Finklea v. State*, 777.

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